

Workplace Investigations

Contributing Editors

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

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

In Ireland, employees have a constitutional right and an implied contractual right to natural justice and fair procedures. If a workplace investigation is not conducted in accordance with these principles, an employee may allege that the investigation is fundamentally flawed. If such an allegation is made then an employee may seek recourse from the Workplace Relations Commission (WRC) or potentially the High Court. The WRC is the body in Ireland tasked with dealing with employment law-related claims, including unfair dismissal.

The constitutional rights that employees enjoy were specified in the Supreme Court case of *Re Haughey* in 1971. That case held that where proceedings may harm the reputation of a person, public bodies must afford certain basic protections of constitutional justice to a witness appearing before it. It further stated that article 40.3 of the Irish Constitution is a guarantee to the citizen of basic fairness of procedures. These protections, known as “*Re Haughey rights*” are implied in each contract of employment.

A Code of Practice was introduced in 2000, namely S.I. No. 146/2000 - Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 (the Code). The Code set out the procedures for dealing with grievances or disciplinary matters, which must comply with the general principles of natural justice and fair procedures and include:

- that employee grievances are fairly examined and processed;
- that details of any allegations or complaints are put to the employee concerned;
- that the employee concerned is allowed to respond fully to any such allegations or complaints;
- that the employee concerned is given the opportunity to avail of the right to be represented during the procedure; and
- that the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

Further Codes of Practice on the prevention and resolution of bullying at work and on dealing with sexual harassment and harassment at work were published in 2021 and 2022, respectively. The provisions of these codes are admissible in evidence before a court, the WRC and the Labour Court.

In addition to the above, the Data Protection Commission published Data Protection in the Workplace: Employer Guidance in April 2023.

All employers should have specific and up-to-date policies dealing with how workplace investigations will be carried out that are suitable for their organisation. These policies may vary, depending on the subject of the investigation and the size and type of employer. However, all should adhere to the principles identified above to ensure that a robust policy is in place and can be utilised.

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Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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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Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

- The Constitution of the Federal Republic of Nigeria, 1999 (as amended)
- The Criminal Code Act
- Penal Code Law
- Money Laundering (Prohibition) Act 2011 (as amended)
- Freedom of Information Act 2011
- Terrorism (Prevention) Act 2013
- Independent Corrupt Practices and other related offences Act 2000
- Code of Conduct Bureau and Tribunal Act
- Companies and Allied Matters Act 2020
- Nigerian Code of Corporate Governance 2018
- Economic Financial Crime Commission (Establishment) Act 2004
- Investment Securities Act 2007
- Central Bank of Nigeria Act 2007
- Banks and Other Financial Institutions Act 2020
- Whistleblowing Programme under the Ministry of Finance

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Switzerland

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

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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02. How is a workplace investigation usually commenced?

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Investigations can start in multiple ways. They usually stem from an employee raising a grievance, a bullying complaint, or a possible protected disclosure. Investigations may also stem from the employer in a disciplinary context, or indeed can be commenced if an external complaint or issue is raised by a third party of the organisation.

The first thing the employer must consider is whether an investigation is necessary. It may be that the issue at hand can be resolved informally or is of such a nature that it cannot be investigated, either through a lack of detail or simply because the subject of the complaint is no longer an employee. Any such decision to investigate or not should be carefully documented.

The next step to determine is the nature of the investigation. It should be clear at the outset whether the investigation is simply a fact-gathering exercise or if the investigator will be tasked with making findings on the evidence. The distinction is significant as a fact-gathering investigation can proceed without prompting the full panoply of rights, but the basic principles of fairness should still be applied. A fact-gathering investigation should determine whether there is or is not, a case to answer. If a disciplinary hearing follows then the rights outlined in question 1 will apply at that stage. If it is a fact-finding investigation, the rights apply from the outset of the process. The employee who is required to respond to the issues (the respondent) should be fully aware of the extent of the investigation. The investigator appointed to do the investigation should be clear about what is expected of them.

If the employer believes an investigation is necessary, it should be acknowledged and started without delay. In particular, according to the Protected Disclosures legislation, a report should be acknowledged within seven days.

An employer should consider and identify the scope of the investigation and establish who will investigate the matter. Terms of reference under which the investigation will be carried out should be established by the employer and shared with the employee raising the issue (the complainant). An employer should not seek agreement on the terms, but invite commentary to ensure that the full scope of the investigation is captured within the terms of reference. Robust terms of reference that lay down the clear parameters of the investigation will assist the investigator and all parties involved in the process.

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Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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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Author: *Adekunle Obebe*
at Bloomfield LP

A workplace investigation is conducted to verify alleged misconduct within a workplace.^[1] Once a complaint is made regarding wrongdoing, misconduct or unethical behaviour by an employee or group of employees within a workplace, an investigation is required to confirm the complaint and if it is confirmed, the body in charge of supervising the employees (usually the HR specialist, disciplinary committee or line managers) determine and implement necessary corrective or disciplinary actions.

^[1] [Conducting Internal Investigations In Organisation - Health & Safety - Nigeria \(mondaq.com\)](#)

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Switzerland

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

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 exist, 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]

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Workplace suspensions in Ireland are a contentious issue and can result in an employer defending injunction proceedings in the High Court before an investigation has started.

In the case of *Governor and Company of the Bank of Ireland v Reilly*, the judge stated: "The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing."

In the 2023 case of *O'Sullivan v HSE*, the Supreme Court held that the Health Service Executive acted fairly and reasonably as an employer in suspending a consultant doctor after he had performed experiments on patients without their consent. This ruling overturned the Court of Appeal's earlier decision that previously found the suspension to be unlawful, as the consultant did not represent an immediate threat to the health of patients.

The Supreme Court considered whether the employer's decision to place the consultant on administrative leave met the test set out in the English case of *Braganza v BP Shipping Limited & Anor*. In that case, the court held that the decisionmaker's discretion would be limited "by concepts of good faith, honesty and genuineness and the need for absence of arbitrariness, capriciousness, perversity and irrationality."

In relying on the principles set out in the *Braganza* case, the Irish courts have reinforced the right of a decision-maker in an employment context to have discretionary power when implementing a suspension and that any decision to do so must be made honestly and in good faith. Employers should obtain legal advice when considering whether to suspend an employee in any circumstance.

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Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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

However, it should be noted that:

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

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

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

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

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Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Yes, an employee can be suspended during an investigation to allow the employer to investigate the allegations against the employee unhindered and without undue interference by that employee. A suspension under the law merely prevents the employee from discharging the ordinary functions of his or her role without any deprivation of his rights during the period of the suspension. Thus, unless there is an express provision in the contract of employment or employee's handbook stating that the employee can be suspended with or without half pay, the employee would be entitled to a full salary.

Further, the duration for which the employee may be suspended should be as contained in the employee's contract, employee's handbook, or letter of suspension.

In the recent case of *GLOBE MOTORS HOLDINGS NIGERIA LIMITED v. AKINYEMI ADEGOKE OYEWOLE (2022)*, the court held, *"Since suspension is not a termination of the employment contract nor a dismissal of the employee, the implication is that the employee is still in continuous employment of the employer until he is recalled or formally terminated or dismissed. Pending his recall or dismissal, a suspended employee is entitled to his wages or salary during the period of suspension, unless the terms of the contract of employment or the letter of suspension itself is specific that the suspended employer will not be paid salaries during the period of suspension"*.

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Switzerland

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

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.

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

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

An investigator does not have to hold any minimum qualifications. More often than not it is an employee's manager or HR manager who is carrying out the investigation. Crucially, the person carrying out the investigation must not be involved in the complaint, as an argument of bias could be made before the investigation begins. The investigator should also be of suitable seniority to the respondent and have the necessary skills and experience to carry out an investigation. If a recommendation by the investigator is made to progress the matter to a disciplinary process, which may in turn be the subject of the appeal, there should be adequate, neutral personnel within the organisation to deal with each stage. Again if the investigator and the disciplinary decisionmaker are the same person, an argument of bias will be made that will usually lead to a breach of fair procedures and any decision being unsustainable. Frequently, employers outsource the investigation to an external third party as there may simply not be adequate personnel within the organisation to carry out the process. Employers should ensure that within their policies the right to appoint an internal or external investigator is reserved.

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Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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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Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Typically, the legal department, the chief compliance officer, the HR manager, the audit committee or any other committee as may be set up by the company may conduct a workplace investigation. However, in other instances, the company may engage the services of independent external personnel to assist with conducting an internal investigation.

The minimum qualification or criteria of the person conducting the investigation should be as contained in the relevant company policies. Criteria may include independence, objectivity and impartiality.

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

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.

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

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Arguably yes, but it is the exception rather than the rule and it will depend upon the circumstances of the case. Generally, courts would be slow to intervene in ongoing workplace investigations. However, an employee may seek injunctive relief to prevent an investigation if they can show that the investigation is being conducted in breach of a policy or breach of fair procedures to such an extent that there is no reasonable prospect that the investigation's outcome(s) could be sustainable.

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Author: *Giovanni Muzina, Arianna Colombo*

at BonelliErede

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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Author: *Adekunle Obebe*
at Bloomfield LP

Generally, issues surrounding workplace investigations are usually embedded in either the employee's contract or handbook, which is binding on the employee. Thus, an employee cannot validly bring an action to stop the investigation unless his rights as guaranteed by the Constitution, the Employee's handbook, and other laws such as a right to a fair hearing are violated during the investigation.

Consequently, the employee may apply to the National Industrial Court for an order of interim relief against his or her employer restraining further prejudicial investigation.

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Switzerland

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

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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06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Yes, but a qualified yes. To deny an employee who is the respondent to the complaint the right to cross-examine the complainant during a workplace investigation may amount to a breach of fair procedures. This does not mean in practice that a complainant or witness will have to physically or virtually attend a meeting to be subjected to cross-examination. What usually happens, in practice, is that specific questions of the respondent are put to the witness by the investigator for them to respond. On occasion and depending on the circumstances, the witnesses may respond in writing.

Generally, if witnesses do not wish to participate in workplace investigations and they are not the witnesses from whom the complaint originated, there is little that can be done. An employee may not want to be seen as going against a colleague, which impacts the wider issue of staff morale. An employer cannot force them to participate. Also an employee who is the respondent should be careful about seeking to compel witnesses to attend. While the respondent may request support from a colleague to act as a witness, that colleague may view things differently, which can lead to further issues.

In any event, employees cannot be victimised or suffer any adverse treatment for having acted as a witness.

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Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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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Author: *Adekunle Obebe*
at Bloomfield LP

The employee's contract, employee handbook or company policies typically mandate an employee to cooperate and participate in good faith in any lawful internal investigation undertaken by the company, and also protects an employee acting as a witness in an internal investigation. Some of the legal protections available to an employee acting as a witness during workplace investigations are freedom from intimidation, threats or the loss of employment.

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

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](https://www.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](https://www.hrtoday.ch), last visited on 17 June 2022.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Under the GDPR (General Data Protection Regulation), personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. The Data Protection Commission published *Data Protection in the Workplace: Employer Guidance* in April 2023, which is a useful guide.

Employers should exercise caution when gathering physical evidence that may involve the use of CCTV or other surveillance practices. The Irish Court of Appeal in the case of *Doolin v DPC* examined the use by an employer of CCTV footage for disciplinary purposes and found such use constituted unlawful further processing. The original reason for processing the CCTV footage was to establish who was responsible for terrorist-related graffiti that was carved into a table in the staff tearoom. It subsequently transpired Mr Doolin, who was in no way connected to the graffiti incident, had accessed the tearoom for unauthorised breaks and a workplace investigation followed. The original reason for viewing the CCTV related to security, but further use of the CCTV footage in the disciplinary investigation was not related to the original reason. This case confirms that employers must have clear policies in place in compliance with both GDPR and the Data Protection Act 2018 specifying the purpose for which CCTV or any other monitoring system is being used. Not only that, but these policies must be communicated to employees specifying the use of such practices.

It is not only data about the investigation that must be processed fairly, but any retention of the data, which can only be further processed with good reason. It is a legitimate business reason to retain data to deal with any subsequent requests or appeals under various internal or statutory processes, provided employees have been advised of the relevant retention period.

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Italy

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).

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Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

When gathering evidence, the person being investigated is protected by the Constitution, the Freedom of Information Act and the Nigerian Data Protection Regulation (NDPR), among others.

The Constitution, particularly section 37, guarantees the right of a person to privacy.

The NDPR is the main data protection regulation in Nigeria. It regulates the processing and transfer of personal data.

Further, the Freedom of Information Act, 2011 prohibits the disclosure of information gathered during an

investigation to the public.

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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.^[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.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

The first consideration here is what constitutes "employees' possessions". More often than not, employees will be using employer property and there should be clear policies in place that specify company property.

The difficulty arises if an employee is using personal equipment such as a mobile phone for work purposes. While there may be specific applications dealing with work-related matters that are accessible by the employer remotely, some applications may be device-specific and that is where issues may arise. In such instances, it is not unreasonable to ask the employee to provide such information or consent to a search of their personal property. However, this is the exception rather than the rule and all other legitimate avenues of obtaining such information should be explored first. Further, such requests for information should not be a fishing expedition as an employee has a reasonable expectation of privacy at work, which must be

balanced against the rights of the employer to run their business and protect the interests of their organisation.

A search of physical items such as a desk or drawers should only be conducted in exceptional circumstances, even where there is a clear, legitimate justification to search and the employee should be present at the search.

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Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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.

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Yes, an employer can search the possessions or files of an employee as part of an investigation where the employee’s contract or handbook authorises such a search and there is a reasonable suspicion of

wrongdoing.

Last updated on 15/09/2022



Switzerland

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

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.

Last updated on 15/09/2022

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Most whistleblowing policies will include a section that provides for an initial assessment of the complaint as to whether it meets the definition of a protected disclosure. This assessment, which ought to be carried out by a designated person who has been appointed to deal with disclosures, is a useful tool as some matters which may be labelled as whistleblowing may fall under the grievance procedure.

Where there are grounds, an investigation will be commenced. Under the Protected Disclosures (Amendment) Act 2022, whistleblowers are protected from penalisation for having made a protected disclosure, under the Act.

Penalisation may include; suspension, lay-off or dismissal; demotion, loss of opportunity for promotion or withholding of promotion; transfer of duties, change of location or place of work; reduction in wages or change in working hours; the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty); coercion, intimidation, harassment or ostracism; or discrimination, disadvantage or unfair treatment.

If an employee (which includes trainees, volunteers, and job applicants) alleges that they have suffered penalisation as a result of making a protected disclosure, they may apply to the Circuit Court for interim relief within 21 days of the date of the last act of penalisation by the employer.

A claim for penalisation may also be brought before the WRC within six months of the alleged act of

penalisation. If an employee alleges that they were dismissed for having made a protected disclosure, the potential award that the WRC can make increases from the usual unfair dismissal cap of two years' pay to up to five years' gross pay, based on actual loss.

Where a complaint of whistleblowing is made, employers should ensure that they appoint investigators with the appropriate knowledge and expertise to deal with such a matter and comply with the time limits set by legislation.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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

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

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

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

[1] The provisions of the Decree are binding since July 15, 2023, for larger companies, and as of Dec. 17,

2023, for entities employing an average of from 50 to 249 employees.

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

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

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

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

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

Last updated on 10/01/2024

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Consideration must be given to the confidentiality or anonymity of the whistleblower, when an investigation involves whistleblowing.

Last updated on 15/09/2022

Switzerland

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

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.

Last updated on 15/09/2022

10. What confidentiality obligations apply during an investigation?

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

This will depend on the nature of the investigation but, generally, investigations should be conducted on a

confidential basis. All who participate in the investigation should be informed and reminded that confidentiality is a paramount consideration taken very seriously. However, it should be borne in mind that confidentiality cannot be guaranteed by an employer as the respondent in an investigation is entitled to know who has made complaints against them. Furthermore, the respondent is entitled to cross-examine the complainant and any witnesses, although in practice this right is rarely invoked strictly and is facilitated by the investigator, with questions from the respondent being put to the complainant and other witnesses.

On occasion, a breach of confidentiality may warrant disciplinary action, but this will depend on the circumstances. Exceptions to the requirement to keep matters confidential will of course apply where employees seek support and advice from others such as companions, trade union representatives or legal advisors. It may also not be possible to maintain confidentiality where regulators or the authorities are informed of the investigation.

Also, confidentiality may not be maintained if it is in the interests of the employer to communicate the complaint and any subsequent investigation, for example on a health and safety basis.

Last updated on 11/10/2023



Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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.

Last updated on 10/01/2024



Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Workplace investigations should be kept strictly confidential to protect the parties involved in the investigation from victimisation. Some of the confidential obligations that apply during investigations are the identities of the parties involved in the process (whether as a complainant, respondent or witnesses), the confidentiality of reports, recordings and other documents generated or discovered during the investigation, as well as attorney-client privilege between the employee and his or her attorney, provided that such privilege is within the bounds of the law.

Last updated on 15/09/2022

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

Besides the employee's duty of performance (article 319, Swiss Code of Obligations), the employment relationship is defined by the employer's duty of care (article 328, Swiss Code of Obligations) and the employee's duty of loyalty (article 321a, Swiss Code of Obligations). Ancillary duties can be derived from the two duties, which are of importance for the confidentiality of an internal investigation.^[1]

In principle, the employer must respect and protect the personality (including confidentiality and privacy) and integrity of the employee (article 328 paragraph 1, Swiss Code of Obligations) and take appropriate measures to protect the employee. Because of the danger of pre-judgment or damage to reputation as well as other adverse consequences, the employer must conduct an internal investigation discreetly and objectively. The limits of the duty of care are found in the legitimate self-interest of the employer.^[2]

In return for the employer's duty of care, employees must comply with their duty of loyalty and safeguard the employer's legitimate interests. In connection with an internal investigation, employees must therefore keep the conduct of an investigation confidential. Additionally, employees must keep confidential and not disclose to any third party any facts that they have acquired in the course of the employment relationship, and which are neither obvious nor publicly accessible.^[3]

^[1] Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

^[2] Claudia Fritsche, *Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute*, p. 202.

^[3] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 133.

Last updated on 15/09/2022

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

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Under the fair procedures outlined above, details of the allegations or complaints against the employee should be put to them to enable them to fully respond to the allegations raised. The employee should also be provided with any relevant policies pertaining to the allegations against them, along with all documentary evidence of the allegations and the specific terms of reference that define the scope of the investigation. The employee should also be informed of their right to be represented, see question 15.

Last updated on 11/10/2023

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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).

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

An employee must be given the full details of the allegations against him or her to enable the employee to make adequate representations against the complaints made against him or her.

Last updated on 15/09/2022

Switzerland

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

As a result of the employer's duty of care (article 328, Swiss Code of Obligations), employees under investigation have certain procedural rights. These include, in principle, the right of the accused to be heard. In this context, the accused has the right to be informed at the beginning of the questioning about the subject of the investigation and at least the main allegations and they must be allowed to share their view and provide exculpatory evidence.^[1] The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.^[2]

Covert investigations in which employees are involved in informal or even private conversations to induce them to provide statements are not compatible with the data-processing principles of good faith and the requirement of recognisability, according to article 4 of the Swiss Federal Act on Data Protection.^[3]

Also, rights to information arise from the Swiss Federal Act on Data Protection. In principle, the right to information (article 8, Swiss Federal Act on Data Protection) is linked to a corresponding request for information by the concerned person and the existence of data collection within the meaning of article 3 (lit. g), Swiss Federal Act on Data Protection. Insofar as the documents from the internal investigation recognisably relate to a specific person, there is in principle a right to information concerning these documents. Subject to certain conditions, the right to information may be denied, restricted or postponed by law (article 9 paragraph 1, Swiss Federal Act on Data Protection). For example, such documents and reports may also affect the confidentiality and protection interests of third parties, such as other employees. Based on the employer's duty of care (article 328, Swiss Code of Obligations), the employer is required to protect them by taking appropriate measures (eg, by making appropriate redactions before handing out copies of the respective documents (article 9 paragraph 1 (lit. b), Swiss Federal Act on Data Protection)).^[4] Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9

paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

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

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

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

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

Last updated on 15/09/2022

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Failure by an employer to provide the identity of the complainant, witnesses or sources of information seriously impinges upon the employee's right to fair procedure and could result in a flawed investigation.

Last updated on 11/10/2023



Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Typically, the identities of the complainant, witnesses and sources of information for the investigation are kept confidential.

Last updated on 15/09/2022

Switzerland

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

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.[\[1\]](#)

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

Last updated on 15/09/2022

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

There is no legislation regarding NDAs, but there is a Bill before the legislature proposing to “restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination”. It is currently at the report stage. Whether it passes remains to be seen, but there has in recent times been strong criticism of the use of NDAs to cover up matters that ought to be fully investigated and dealt with in an organisation.

Settlement agreements, however they arise, may include confidentiality clauses which may, depending on the terms of the agreement, extend to the fact and substance of an investigation, but as in the UK an employee's right to make a protected disclosure or report a criminal offence cannot be waived by signing an NDA.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

NDAs are usually part of an employee's contract and, as such, create a contractual obligation between the parties privy to it. However, where the subject matter of an investigation borders on matters of a criminal nature, it might be impossible for parties to the NDA to continually uphold the obligation under the NDA because the parties have an obligation to the state to disclose facts of a criminal nature.

Last updated on 15/09/2022

Switzerland

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

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

14. When does privilege attach to investigation materials?



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

It would be difficult to assert privilege over materials that relate to the investigation itself.

Privilege may arise before the instigation of an investigation where an employer may seek legal advice from their legal advisors over the initial complaint and appropriate next steps. Subject to the relevant tests being met, Legal Advice Privilege arises in respect of a confidential communication that takes place between a professionally qualified lawyer and a client. Who the client is will be of significant importance as they must be capable of giving instructions to their lawyer, on behalf of the employer. Caution should be exercised by employers if advice to "the client" is disseminated further within the business to other members of management. If such a scenario arises, then there is a risk that privilege may be waived and such material could be disclosable under a data subject access request. Litigation privilege arises with respect to confidential communications that take place between a lawyer or a client and a third party for the dominant purpose of preparing for litigation, whether existing or reasonably contemplated.

It is also prudent to consider whether an external investigator should have access to their own independent legal advisor, and the funding arrangements for such advice would have to be considered by the employer.

Last updated on 11/10/2023



Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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.

Last updated on 15/09/2022



Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Privilege attaches to investigation materials when a legal practitioner facilitates the internal investigation. Documents prepared during a workplace investigation will not automatically attract legal professional privilege, unless the investigation is facilitated by a legal practitioner.

Switzerland

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

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.

^[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

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

This depends on the nature of the investigation. If the complaint originates from an employee as a grievance, then the employee would have the right to representation during the investigation. Representation in this context is more akin to the right to be accompanied, as in the UK by either a colleague or trade union representative.

If the investigation is a fact-gathering investigation originating from the employer, then the employee would not have the right to be represented during the investigation. That right would apply only at any subsequent disciplinary hearing.

If the investigation is a fact-finding investigation as part of a disciplinary process originating from the employer, then the employee ought to be given the right to be represented at that investigation stage. Again the right is akin to the right to be accompanied. There was concern from employers that the right had been expanded to legal representation in disciplinary matters with the case of *McKelvey v Irish Rail*. However, the Supreme Court in that case clarified that the right to legal representation in disciplinary

processes is only in exceptional circumstances.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

The Constitution guarantees the right of every person to legal representation during investigations and interrogations by law enforcement agencies. However, our labour legislation is silent on whether an employee has a right to be accompanied or have legal representation during an investigation. Whether an employee has a right to legal representation will depend on the policy of the employer as well as the nature of the interrogation.

In practice, an employee is usually not accompanied or represented legally during an investigation. However, unless it is stipulated in the employee's policy, nothing prohibits the employee from being accompanied or represented legally during an investigation.

Last updated on 15/09/2022

Switzerland

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

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.

[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.

Last updated on 15/09/2022

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

This will depend on the agreement with the works council or trade union. The employee who is the respondent to the investigation may have views on their trade union being informed, aside from any agreement, which should be taken into account under GDPR provisions.

Last updated on 11/10/2023



Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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

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

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

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

Last updated on 10/01/2024

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

The law is silent on whether a member of a trade union has the right to be informed or involved in the investigation. Typically, this is dependent on the employee's contract, handbook or other policies of the employer.

Last updated on 15/09/2022

Switzerland

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

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.

Last updated on 15/09/2022

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

If an employee assistance programme is in place, an employee irrespective of their role in the investigation should be directed to the programme and encouraged to avail of the services. Investigations can become protracted and employees should be kept informed as to progress and what is required of them regarding participation. Regular checks of the health and well-being of employees should also be made. Even if such a programme is not in place, occasionally and depending on the issues giving rise to the investigation, it may be appropriate for the employer to cover the cost of counselling to a certain extent.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*

at BonelliErede

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

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

An employee being investigated has a right to be heard before a decision being made by the employer. Further, the body responsible for investigating the employee must be independent, so as not to be considered biased.

Last updated on 15/09/2022

Switzerland

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

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]

^[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.

Last updated on 15/09/2022

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

If an investigator finds other issues that are outside the scope of the terms of reference, these should not

be ignored but equally should not be included as part of the investigation, as they are beyond the remit of the investigation that was established at the beginning. An investigator should identify the other matters that may require further action and report these to the employer separately so as not to conflate issues.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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.

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Where unrelated matters are revealed as a result of the investigation, the body investigating the employee is expected to inform the employee of the new matters and give him adequate time to respond.

However, there are exceptional cases where a crime is revealed during an investigation. In such instances, the employer is required to report its findings to the police for investigation and possible prosecution.

Last updated on 15/09/2022

Switzerland

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

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.

Last updated on 15/09/2022

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

If the subject of the grievance relates to the subject of the investigation, the employee should be reassured that all the matters that they wish to raise concerning the matter under investigation will be dealt with in full as part of the investigation.

If the employee raises a grievance that is unrelated to the matter under investigation, then that can be dealt with concurrently, albeit by a separate investigator.

The initial investigation does not automatically need to be halted upon receipt of a grievance. Frequently, grievances are submitted in the hope that they derail or delay the original investigation. Careful consideration should be given as to the nature of the grievance and the appropriate course of action adopted.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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).

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

It is not unusual for an employee under investigation to raise a grievance during the investigation. This grievance may be on the same subject matter as the complaint being investigated or may disclose new facts outside the scope of the matter being investigated.

Where the issue discloses new facts, the employer is required to investigate those facts without suspending the investigation. However, where the grievance relates to the same subject matter as the complaint being investigated, the employer may either suspend the investigation to allow the investigation to recognise the grievance and the complaint against the employer or proceed with the investigation while noting that the matter disclosed is being or will be investigated.

Last updated on 15/09/2022

Switzerland

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

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).

Last updated on 15/09/2022

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

If an employee goes off sick during the investigation, it is reasonable to adjourn the investigation until the employee is fit to return to work. Difficulties arise if it is a prolonged absence. The absence may necessitate a referral to an occupational health expert and it may be necessary to seek medical advice as to whether the employee can continue to participate in the investigation. It may be that reasonable accommodations should be considered to ensure that the employee can continue to participate. Such situations may impinge on the investigator's ability to conclude the investigation. In that instance, it would be prudent for the investigator to document all attempts to involve the employee in the investigation and to assess whether it can be concluded without the further involvement of the employee.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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).

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

The investigation would be suspended until the employee returns from sick leave. The investigation will immediately restart upon the return of the employee.

Last updated on 15/09/2022

Switzerland

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

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).

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

Last updated on 15/09/2022

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Workplace investigations can originate from criminal investigations or proceedings. It may be that an employer only becomes aware of a matter through the involvement of the police (An Garda Síochána) or regulatory bodies.

If a criminal investigation is pending it can complicate a workplace investigation, but it will be specific to the nature of the complaint. Likewise, where a regulatory investigation is in scope, an employee may argue

that any internal investigation should be put on hold, on the basis that it will harm any regulatory investigation. Such matters will be dealt with on a case-by-case basis as it may be some time before any regulation investigation commences, by which time the workplace investigation and any subsequent process may have been concluded.

Employers will also have to consider their reporting obligations to An Garda Siochana. If the matter relates to fraud, misuse of public money, bribery, corruption or money laundering, for example, reporting obligations arise under section 19 of the Criminal Justice Act 2011. A failure to report information that an employer knows or believes might be of material assistance in preventing the commission of an offence, or assisting in the apprehension, prosecution or conviction of another person may be guilty of an offence.

Also, the Irish Central Bank's (Individual Accountability Framework) Act 2023 (the Act) was signed into law on 9 March 2023 but has not yet been enacted. The framework provides scope for a senior executive accountability regime, which will initially only apply to banks, insurers and certain MiFID firms. However, its application may be extended soon. The Act forces employers to engage in disciplinary action against those who may have breached specific "Conduct Standards".

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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 pending 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.

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Where an employee has committed misconduct at work that is also the subject of a police investigation, the employer can conduct its own investigation and does not have to await the outcome of the criminal proceedings. The Supreme Court, in the case of *Dongtoe v CSC Plateau State* (2001), held that it is preposterous to suggest that the administrative body should stay its disciplinary jurisdiction over a person who had admitted criminal offences.

Further, the police or regulator may compel the employer to share evidence with it in the interests of justice.

Last updated on 15/09/2022



Switzerland

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

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

The employee whose actions are the subject of the investigation must be advised of the outcome of the investigation. They are usually provided with a copy of the investigator's report.

Last updated on 11/10/2023



Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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.)

Last updated on 15/09/2022



Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

The employee under investigation must be informed of the outcome of the investigation as soon as a decision is reached.

Last updated on 15/09/2022

Switzerland

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

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]

^[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.

Last updated on 15/09/2022

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

The investigation report should be shared in full, unless there is some specific reason for not doing so. One example is where there is a possibility of a criminal investigation; in that instance, it may be appropriate not to share the full report. Occasionally, there may be several respondents involved in the complaint, and each respondent may only be entitled to the report that relates to them.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

There is no general obligation of the employer 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).

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

The employer needs to balance the interests of the employee investigated, and the interests of other persons involved in the investigation such as the complainant and witnesses. Thus, the employer may either share the findings of the investigation or the full investigation report, provided that the identities of all other persons involved in the investigation are kept confidential.

Last updated on 15/09/2022

Switzerland

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

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]

^[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).

Last updated on 15/09/2022

24. What next steps are available to the employer?

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

The investigator will usually set out recommendations within their report. It will then be up to the employer to act on those recommendations and to accept or reject the findings (if it were a fact-finding investigation). If, for example, a recommendation is made that the matter should proceed to a disciplinary hearing, the employer should then arrange such a hearing and nominate an impartial member of management to carry out the disciplinary hearing. In some instances, recommendations are made by investigators to provide training or update policies and such recommendations should be acted upon without delay. It may also be appropriate to notify a specific regulator of the outcome of the investigation.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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).

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Upon the completion and receipt of the findings of the investigation, the employer may affirm the employee’s innocence or take disciplinary action against them.

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Switzerland

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

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.

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?

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Depending on the nature of the subject matter of the investigation, it may be appropriate to notify the Garda Síochána or a specific government body such as Revenue. Also, if the employee occupies a regulated position, it may be necessary to inform the relevant regulator. Again, compliance with GDPR obligations should be borne in mind.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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).

Last updated on 15/09/2022

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

Investigation findings may be disclosed to the employee and every other person having an interest in the investigation. Where it is discovered that a crime has been committed, the investigation findings may be disclosed to the regulators or police.

Typically, interview records are kept private and will not be disclosed unless it is interest of justice.

Switzerland

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

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]

^[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.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Irrespective of the outcome of the investigation, the fact that an employee was subject to an investigation is not the key issue. The key concern is whether any further action was taken as a result of the investigation. If a disciplinary process ensued, then it is the outcome of that disciplinary record and any subsequent appeal that would or would not be noted on an employee's record. If a disciplinary sanction were imposed then the length of time the sanction remains on the employee's record would depend on what is specified in the disciplinary policy.

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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.

Last updated on 10/01/2024

Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

The law does not provide for the time the outcome of the investigation may remain on the employee's record. However, this will depend on the employer's record-retention policies, which must comply with applicable data protection laws.

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Switzerland

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

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

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

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

Last updated on 15/09/2022

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

Ireland

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

A failure to follow fair procedures in the investigation can have significant consequences.

Although the exception rather than the rule, an employee could challenge the investigation through injunctive proceedings if there is a breach of fair procedures. Such action would be taken before the High Court. Injunction proceedings may be brought while the investigation is ongoing, or just before its conclusion to prevent publication of a report making specific findings against an employee. A successful injunction may curtail any subsequent attempt to investigate the matter as allegations of penalisation, prejudice and delay may arise.

Errors during the investigation can also give rise to a complaint of constructive dismissal, with allegations that flaws in the procedure have fundamentally breached the implied term of mutual trust and confidence.

A flawed investigation can also undermine any disciplinary process and sanction that is imposed as a result. This commonly occurs when an employee has been dismissed following a disciplinary process launched on foot of the investigation. While dismissal may be an appropriate sanction, the dismissal can still be found to be unfair if there is a failure to follow fair procedures. An employee may challenge their dismissal before the WRC and the employer should be alive to not only an unfair dismissal complaint, but allegations of discrimination and penalisation.

Overall, to carry out a successful workplace investigation, an employer should consider taking advice at the earliest opportunity to ensure that the investigation can withstand challenges.

Last updated on 11/10/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

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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Nigeria

Author: *Adekunle Obebe*
at Bloomfield LP

- Violation of Fundamental Rights of the Employee
- Breach of Contract of Employment or wrongful termination

Last updated on 15/09/2022

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

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]

^[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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Contributors

Bláthnaid Evans
Mary Gavin
Ogier



Italy

Giovanni Muzina
Arianna Colombo
BonelliErede



Nigeria

Adekunle Obebe
Bloomfield LP



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer

www.internationalemploymentlawyer.com