

Workplace Investigations

Contributing Editors

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

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

Netherlands

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All parties involved in the investigation have the right to a fair hearing. How this is embedded in the investigation should be laid down in the protocol drawn up at the start. When the employee, and others involved, receive an invitation for an interview in the context of an investigation, this invitation should include whether or not the employee has the right to bring legal representation to the interview. Given the unequal relationship between employer and employee, this will most likely be the case.

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Spain

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A workplace investigation under Spanish law is a fact-finding exercise and not a disciplinary procedure. For this reason, employees are not entitled to representation during an investigation (it is not even necessary to inform them about the enquiry).

If the investigated employees are made aware of the investigation (eg, because they will be interviewed or questioned), then it is good practice to allow them to be accompanied by external counsel or an employee representative. This would reduce the risk that employees would claim that they were under duress during the interview, or that they challenge the validity of the evidence obtained by the company.

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Switzerland

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.

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