

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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01. What legislation, guidance and/or policies govern a workplace investigation?

Spain

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Spain has not passed any statutes, regulations or policies specifically governing workplace investigations. Instead, general employment and data protection legislation, which safeguards employees' rights, is fully applicable during these types of enquiries.

These statutes focus on employee privacy. As a result, the application of this legislation:

- limits the matters that may be investigated: they have to be relevant to the employment relationship and there has to be a legitimate reason to conduct the enquiry;
- sets boundaries to the means that may be lawfully used by the company in the investigation: they must be the least intrusive means for employees' rights (for instance, an email review should be a last resort, reserved for when less-invasive means are not available or would not be effective); and
- states that the companies' decisions during the investigation must be proportional in light of the facts under review and the legal consequences attached to them.

Collective bargaining agreements, which in Spain generally apply to every company within their scope of application (normally a given economic sector), may regulate workplace investigations. However, it is unusual for collective bargaining agreements to regulate workplace investigations.

Finally, major international corporations with a presence in Spain do tend to have an ethics or whistleblowing policy that governs how an investigation should be conducted. Even if these are self-imposed policies, they are contractually binding and, once established, must be respected by companies.

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Switzerland

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There is no specific legal regulation for internal investigations in Switzerland. The legal framework is

derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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



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For the reasons outlined in question 15, companies sometimes choose to voluntarily provide support to employees involved in the investigation (to ensure that evidence was lawfully obtained during the interview and is valid).

For investigated employees, one available support mechanism is for the company to cover the legal fees of an external counsel during the investigation or to offer to involve employee representatives. Reassurance may be provided to witnesses by guaranteeing, in writing, that their involvement in the investigation will be kept confidential and will not result in a detriment.

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

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

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

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

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