

Workplace Investigations

Contributing Editors

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



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The issue with revealing unrelated matters to the investigation is that it may jeopardise the entire enquiry. If the unrelated matters are private or the disclosure is construed as a breach of employees' fundamental rights, then the materials gathered during the investigation could be considered to be unlawfully obtained and would not be admitted as evidence in court.

Moreover, the employee could seek damages and a fine could be imposed on the company for breaching its employee's rights.

Finally, if unrelated matters are revealed, it could be a clear sign that the company has failed to conduct a diligent investigation and use the least intrusive means available to it (see question 1). One of the reasons to minimise the number of employees conducting the investigation (see question 4) is to reduce damages if matters unrelated to the investigation are revealed.

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Switzerland

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

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