

Workplace Investigations

Contributing Editors

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

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

Spain

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Since workplace investigations are not regulated in Spain, there are no clear rules as to the amount of information on the investigation that would need to be shared with an employee if the company was compelled to disclose the enquiry (see questions 11 and 22). A good rule of thumb is that an employee should have access to all the information that is relevant to be in a position to oppose the alleged breaches.

Moreover, if the disciplinary measures taken were challenged before a Labour Court – employees in Spain tend to challenge these types of measures – the plaintiff could request the Labour Court to order the company to produce all of the investigation details, including the findings and the full investigation report.

Finally, companies will normally have an interest in producing a report that clearly states the moment in which the fact-finding exercise was concluded and the company had a full picture of the facts. This is because the statute of limitations to sanction employment breaches, which ranges from 10 to 60 days depending on the seriousness of the misconduct, starts to count when the company has a comprehensive view of the events (which would coincide with the date the investigation report was issued).

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Switzerland

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

and reasonable.[\[2\]](#)

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

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



Spain

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Errors during an investigation are normally linked to the breach of the employees' privacy or their personal data rights (see question 1). Breaching these rights might expose employers to:

- Fines from the Labour Inspectorate and the Spanish Data Protection Authority.
- A court awarding damages to the employee.
- Any disciplinary measures adopted by the company as a result of the investigation could be considered null and void.
- The evidenced obtained during the investigation being disregarded by a court.
- In some very serious cases, criminal liability might arise for the individuals who conducted the investigation and breached the employees' rights.

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

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

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

criminal proceedings, to examine whether the evidence could also have been obtained by legal means.^[4]

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

^[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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