# 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?

### Nigeria

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- 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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### Poland

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There is no legislation on this area in Poland. However, employers implement internal policies that provide for workplace investigation rules to fulfil certain legal obligations, including those arising directly from labour law.

Based on the currently binding provisions of labour law, an employer must counteract unwanted behaviour in the workplace (eg, bullying, discrimination and unequal treatment). To fulfil this obligation, employers

implement internal policies that provide a framework for reporting misconduct and conducting internal investigations. They may freely design the rules of such investigations, within the constraints of their policy. Therefore, it is recommended they create the policy based on the following:

- it should be possible to effectively report the misconduct;
- there should be more than one way to report misconduct;
- anonymous reporting should be allowed;
- an investigation committee should be appointed and be objective;
- rules on excluding persons with a conflict of interest from conducting the investigation should be provided; and
- the report from the investigation should be prepared and signed by all persons participating in the process.

However, work on a bill on whistleblower protections is in progress (the Draft Law). The Draft Law will not determine the rules of workplace investigations but it will force employers to implement a whistleblowing procedure and follow-up on recommendations in the case of a report, including initiating an internal investigation where appropriate. Whether an internal investigation is initiated depends on the assessment of a reported irregularity by the employer.

In addition, employers (especially those that are part of an international group) often already implement internal policies on whistleblowing management and internal investigations. Employers often base their policies on guidelines issued by relevant (usually international) organisations.

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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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## United States

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In the United States, any combination of legislation at the federal, state and local level, as well as judicial opinions and regulatory guidance interpreting those statutes, may impose obligations on relevant employers to undertake a timely internal investigation in response to complaints of workplace misconduct and to promptly implement remedial measures, where appropriate.

An employer’s written policies often also set forth the company’s expectations for how its employees, partners, vendors, consultants or other third parties will conduct themselves in carrying out the business of the company, and these policies may include protocols setting forth the parameters for an investigation in the event of potential non-compliance. Such investigatory roadmaps are often described in, for example, employee handbooks or a company’s policy against discrimination and harassment.

Due to the patchwork nature of employment and related laws, it is not possible to cover every investigation

scenario or related legislation in this guide. Employers should instead consult with experienced employment attorneys in their state to ensure compliance with the applicable legal and regulatory regimes.

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# 02. How is a workplace investigation usually commenced?

## Nigeria

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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.

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

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## Poland

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There are no legal requirements in this respect – it depends on the internal policies or practices at a given working establishment. Based on our experience – an internal investigation usually commences with a preliminary assessment of a reported irregularity. If the preliminary assessment leads to a conclusion that a reported situation may be an irregularity, an investigation is launched by appointing a commission or team that conducts the investigation or selecting an investigator. Then, a plan of investigation is established. Depending on the circumstances, the investigation plan may involve a collection of documents or files, their analysis, and interviews with a victim, witnesses or a subject (although the procedure depends on the type of case, internal rules and practice). At the end of the process, the report is prepared by the commission or team with facts established during the process, recommendations, and other suggestions as to the investigated issue.

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## Switzerland

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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 exists, 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]

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[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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## United States

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A workplace investigation is often, although not always, prompted by a complaint of workplace misconduct, usually made directly by the employee who was harmed by the conduct, a third party who witnessed the conduct, or a manager or supervisor who was made aware of the issue and has reporting obligations as a result of his or her role in the organisation.

It is best practice – and often a legal requirement depending on the applicable state law – for companies to clearly outline a complaint process in their policies and to provide employees who experience, have knowledge of, or witness incidents they believe to violate the company's policies with one or more options for making a report. Although the specific complaint procedure may vary depending on the size of the organisation, the nature of the business and the type of complaint at issue, many companies provide for (or require) making a report through one of the following channels:

- a company-managed hotline or online equivalent;
- human resources;
- an affected employee's supervisor or manager; or
- a member of the legal or compliance department.

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

## Nigeria

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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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Polish law does not provide for the suspension of an employee. Instead, an employer may agree with an employee that he or she will be released from the obligation to perform work during a relevant period of investigation (with the right to remuneration). The employer may not do this unilaterally, unless the employee is in a notice period. As an alternative, which is more common in practice, the employer may force the employee to use outstanding holiday leave (subject to limitations provided by law) or the parties may mutually agree on the use of holiday leave or unpaid leave (if the employee has already used his or her holiday entitlement in full).

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## Switzerland

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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.

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

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## United States

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Yes. An employer may suspend the subject of an internal investigation with full pay pending the outcome of an investigation. However, this measure should be used sparingly, for example in cases where an employee has been accused of gross misconduct or where it is the only means of separating the alleged victim of harassment from the accused to prevent continued harassment. As an alternative means of separating the victim from the accused, an employer can consider interim measures such as a schedule change, transfer or leave of absence for the alleged victim with his or her consent (employers should take care not to take any action that could be perceived as retaliatory against the complainant – even if well-intentioned – including involuntarily transferring him or her or forcing a leave of absence).

Where an employer does determine that suspending the subject of an investigation is warranted while the company carries out its investigation, it should provide him or her with a written statement briefly outlining the reason for the suspension and the estimated date the employee will be advised of the investigation outcome and his or her final employment status.

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

### Nigeria

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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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There are no legal requirements in this regard but it is good practice if the team of investigators or individuals who deal with the case consists of:

- a person who has specific knowledge in a given field (concerning the violation);
- a member of the HR team; and
- a lawyer (it is recommended to engage an independent, external lawyer who can maintain the objectivity of the investigation, especially in complex matters or where a conflict of interest arises or may arise).

It is crucial that the investigators are independent (and they must be allowed to act independently).

Also, certain personal features are useful (eg, the ability to objectively assess a situation, empathy, and managing skills).

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## Switzerland

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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.

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

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## United States

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While every internal investigation should be carried out promptly, thoroughly and in a well-documented manner, employers should appoint one individual or team of individuals to oversee all complaints regardless of how they are received. Doing so helps to ensure that all allegations are documented, reviewed and assigned for investigation as consistently as practicable.

Once a complaint is received and recorded, the company should undertake an initial triage process to determine:

- the risk of the alleged misconduct from a reputational, operational and legal perspective;
- who is best suited to conduct an investigation based on the nature of the alleged misconduct and the perceived risk level (potential candidates may include members of human resources, legal or compliance departments, or outside counsel); and
- a plan for investigating the factual allegations raised in the complaint.

The appropriate investigator should be able to investigate objectively without bias (ie, the investigator cannot have a stake in the outcome, a personal relationship with the involved parties and the outcome of the investigation should not directly affect the investigator's position within the organisation); has skills that include prior investigative knowledge and a working knowledge of employment laws; has strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair; is detail-oriented; has the right temperament to conduct interviews; can be trusted to maintain confidentiality; is respected within the organisation; and can act as a credible witness.

At this triage stage, an employer may also wish to use the information collected from the complaint to proactively identify potential patterns or systemic issues at an individual, divisional or corporate level and react accordingly. For example, if a company receives a complaint against a supervisor for harassing conduct and that same individual has already been the subject of previous complaints, the company should consider whether it may be appropriate to engage outside counsel to carry out a new investigation to bring objectivity and lend credibility to the review – even if the prior complaints were not ultimately substantiated following thorough internal investigations. Similarly, the engagement of outside counsel is often appropriate where a complaint involves alleged misconduct on the part of a company's senior management or board members.

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

## Nigeria

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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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## Poland

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This is unlikely. Theoretically, an employee can file a claim against an employer concerning the infringement of personal rights in the course of an investigation and a motion to secure his or her claims, which would consist of an employer being forced to suspend the proceedings, but in practice we have not encountered such a situation.

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## Switzerland

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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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## United States

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In general, private sector employees have considerably fewer rights vis-à-vis a company-led internal investigation than their public sector counterparts. This is because many US states are “at will” employment states, which means that, absent an employment contract that provides otherwise, an employee can be terminated for any reason not prohibited by statute or public policy. Depending on the specific circumstances, however, an employee who is the subject of an internal investigation could bring or threaten legal action according to contract or tort principles to stop an investigation. An employee may also challenge an investigation because it was conducted in violation of certain federal, state or foreign laws, for example, the use of polygraph tests in violation of the Employee Polygraph Protection Act or foreign data privacy laws.

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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?

### Nigeria

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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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In general, an employee may not be forced to act as a witness, but based on the provisions of the Polish Labour Code, an employee must act for the benefit of a working establishment or employer and perform work in line with the instructions of an employer. A lack of cooperation from an employee (eg, refusing to attend a hearing, hiding facts or even false testimony) may constitute a basis for the loss of an employer’s trust in the employee and, as a consequence, may constitute a valid reason for termination (in some specific situations, even without notice).

There is no formal protection for employees who act as witnesses. However, participation in an investigation cannot result in negative consequences (eg, no retaliation is allowed). Also, during an investigation, employees who are bound by professional secrecy are not required to provide information that would imply a breach of such secrecy.

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### Switzerland

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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]

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[1] Nicolas Facincani/Reto Sutter, Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten, published on 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, last visited on 17 June 2022.

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Yes. The investigator is empowered to decide which witnesses should be interviewed as a part of the fact-gathering process. In addition to interviewing the complainant, the investigation should include individual interviews with other involved parties, including the subject of the complaint, as well as individuals who may have observed the alleged conduct or may have other relevant knowledge, including supervisors or other employees. Many companies' code of conduct, employee handbook or similar policy set forth the requirement for current employees to cooperate fully in any investigation by the company or its external advisors and also provide that failure to do so could result in disciplinary action, up to and including termination.

In the absence of contractual protections, employees may have no legal right to refuse to submit to an interview, even if their answers tend to incriminate them. That being said, when acting as a witness in an internal investigation, a current employee is usually afforded similar legal protections as the subject of an investigation, including the right to oppose unreasonable intrusions into his or her privacy and unreasonable workplace searches. For example, certain state laws prohibit an employer from questioning an employee regarding issues that serve no business purpose.

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

## Nigeria

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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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## Poland

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If personal data is involved – the rules and principles of the GDPR will apply. If the physical evidence includes e-mail correspondence, files, or an employee's equipment and possessions, the Labour Code will apply (ie, as a general rule, to monitor it, a monitoring policy must be implemented at that working establishment). Such a policy must strictly determine the aim of the surveillance and an employer must only apply surveillance in situations that reflect this aim. Also, when it comes to monitoring correspondence, it must not infringe on the secrecy of the correspondence, which in practice means that the employer should not check employees' private correspondence when checking their business mailboxes.

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## Switzerland

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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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Documents and instruments that set out a company's policies (eg, employee handbooks, code of conduct or other written guidelines) often contain provisions regarding employee data and document collection, workplace searches, communication monitoring, privacy, and confidentiality. As discussed below, state and federal constitutional, statutory and common law – and in some cases foreign data privacy regimes – may provide additional protections to protect employees from an unwarranted or unreasonable invasion of privacy during an internal investigation.

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

## Nigeria

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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.

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## Poland

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It depends on whether the employer implemented rules of personal control at the workplace. If yes, such rules are applicable. If not, in our opinion if there is suspicion of a serious violation, it is possible to carry out an ad hoc inspection but its scope should be limited only to necessary activities and should not concern an employee's private files or correspondence, so as not to infringe on personal rights. If there is an ad hoc inspection, an employee should be informed in advance, and it should take place in the presence of the employee or employee's representative, observing the rules of fairness and equity.

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## Switzerland

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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]

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[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.

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As there is no unified data protection regime, privacy protections stem from a patchwork of federal and state privacy laws which impose limits on the extent to which an employer can collect information from its employees in connection with an internal investigation. Whether specific conduct violates an employee's rights is a very fact-specific inquiry requiring the application of relevant state laws and a regulatory regime.

In most circumstances, an employer is free to conduct searches of its workplace and computer systems in the course of investigating potential wrongdoing. Such searches are generally not protected by personal privacy laws because workspaces, computer systems and company-issued electronic devices are often considered company property. Many companies explicitly address this in written corporate policies and employment agreements. Employees who use their own electronic devices for work should be aware that work-related data stored on those devices is generally considered to belong to the employer (as a matter of best practice, employers should generally prohibit or at least advise employees against using personal devices for work and to maintain separate work devices, where possible).

These broad investigatory powers notwithstanding, the ability of an employer to conduct searches in furtherance of an internal investigation is not unlimited. For example, if an employer seeks to obtain or review work-related data from an employee's personal device, the employer must be careful to exclude any personal data. Certain states also prohibit an employer from requiring an employee to disclose passwords or other credentials to his or her personal email and social networking accounts, but permit an employer to require employees to share the content of personal online accounts as necessary during an interview while investigating employee misconduct.

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# 09. What additional considerations apply when the

# investigation involves whistleblowing?

## Nigeria

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

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In principle, an internal investigation should be conducted in the same way, regardless of whether it is initiated following a whistleblowing report, an audit, or a monitoring result. This includes anything related to confidentiality, fairness, data privacy protection, etc.

If an internal investigation is initiated following a whistleblower report, the main characteristic that is imposed by the EU Directive on the protection of persons who report breaches of EU Law (Whistleblowers Directive) and that will also be available under the Draft Law is for the organisation (employer) to communicate (if practicable) the report to the whistleblower. Furthermore, the whistleblower should receive feedback as to whether follow-up actions were undertaken following the report and, if yes – what actions were taken – and if not – why the follow-up actions were not taken.

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## Switzerland

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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.

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## United States

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Several federal, state, and local employment laws prohibit retaliation against employees who come forward with complaints or participate in corporate investigations. Employees who possess information regarding corporate misconduct may also be considered whistleblowers protected from retaliation under federal and state whistleblower laws, including but not limited to the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall

Street Reform and Consumer Protection Act, and the Consumer Financial Protection Act of 2010.

An employee generally does not need to show that he or she was terminated or demoted to bring a retaliation claim; other actions on the part of the employer may qualify if they could be seen to discourage employees from raising complaints. To protect against a potential retaliation claim, employers should make clear at the outset of an investigation that retaliation will not be tolerated and require the complaining employee (and potentially his or her manager) to bring any instances of retaliation to the investigator's attention immediately.

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## 10. What confidentiality obligations apply during an investigation?

### Nigeria

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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.

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The law does not cover this issue, apart from whistleblower regulations, as it should be regulated by the employer in their internal rules. The employer should ensure all participants of the investigation keep information related to it secret, as long as is necessary for the investigation (or even longer, if required by law concerning personal data or other specially protected information). Reputation, personal data and the personal rights of other people cannot be breached during the proceedings and this should be protected.

Moreover, according to the Draft Law – a whistleblower's personal data should be kept confidential. It can only be disclosed if law enforcement authorities require it. Also, confidentiality should be guaranteed for the subject and other interested persons.

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### Switzerland

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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]

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[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

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
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Information arising from the initial complaint, interviews and records should be kept as confidential as practically possible while still permitting a thorough investigation. Although an employer must maintain confidentiality to the best of its ability, it is often not possible to keep confidential the identity of the complainant or all information gathered through the investigation process. An employer should therefore not promise absolute confidentiality to any party involved in an internal investigation, including the complainant. The investigator should instead explain at the outset to the complaining party and all individuals involved that information gathered will be maintained in confidence to the extent possible, but that some information may be revealed to the accused or potential witnesses on a need-to-know basis to conduct a thorough and effective investigation.

Last updated on 15/09/2022

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

## 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

## Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

There is no specific mandatory information that should be given to an employee who is the subject of an internal investigation. However, it is common practice that he or she must know what the allegations against them are, on what grounds these allegations are formulated and be given a right to discuss these allegations and the evidence or grounds for these allegations.

Last updated on 20/04/2023

## Switzerland

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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

### United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
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The investigator must disclose to the employee under investigation the purpose of the investigation and, where the investigator is in-house or outside counsel, he or she should disclose that the company is the client.

Last updated on 15/09/2022

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

### 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

### Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

Yes.

Last updated on 20/04/2023

## 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]

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

Last updated on 15/09/2022

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
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In general, except as provided above, depending on the seriousness of the complaint and investigation, the only persons who should be aware of it are the relevant individual in human resources or legal, and where different, the persons assigned to investigate. Although it may not be feasible to maintain absolute confidentiality in conducting an investigation depending on the nature of the allegations, investigators should exercise discretion at all times and, where possible, avoid identifying complainants, the subject of the investigation or witnesses by name where it is not necessary, and where doing so could be detrimental to the fact-finding process.

Last updated on 15/09/2022

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

## 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

## Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

Yes, but it may not stop the disclosure of information at the request of relevant law enforcement authorities.

Last updated on 20/04/2023

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*
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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

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

This is a fact-specific inquiry that depends on the specific circumstances and laws of the relevant state. In general, NDAs are frowned upon but can be used to an extent to keep certain facts and the substance of an investigation confidential. NDAs can never prevent employees from assisting in official agency investigations, however. NDAs also cannot lawfully prohibit employees from officially reporting illegal conduct by their employer.

Last updated on 15/09/2022

# 14. When does privilege attach to investigation materials?

## 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.

Last updated on 15/09/2022

## Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

In general, findings made and documents established during an internal investigation, including the report thereof, are not covered by privilege per se. It can be claimed that they are covered by the employer's commercial secrecy, but this secrecy is not very well protected from requests of law enforcement authorities. Hence, if prosecuting authorities find a report of an internal investigation or other documents established during an investigation relevant for criminal proceedings, they can ask for them. If they are not produced voluntarily, a search can be performed.

Legal privilege will, on the other hand, cover an internal investigation if it is entrusted to an independent lawyer. Specifically, client-attorney privilege will cover all documents that are established during the investigation by a lawyer.

Under Polish law there is no distinction between legal advice privilege and litigation privilege. Hence, legal privilege will cover the documentation of the internal investigation led by a lawyer regardless of whether the lawyer's involvement is for the purpose of obtaining legal advice or because of ongoing or contemplated litigation.

Last updated on 20/04/2023

## 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.

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[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

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
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For legal privilege to apply, a primary purpose of the investigation should be to provide legal advice to the company, including concerning non-lawyers working at the counsel's direction, and legal privilege likely will not apply to internal investigations performed as part of the ordinary course of business or where the investigation is required by a state or federal regulatory regime (eg, post-incident investigations of operations governed by OSHA's Process Safety Management Standards). It is, therefore, important to contemporaneously document the scope and purpose of the investigation and not risk waiving privilege by sharing privileged materials with unnecessary third parties.

Whereas attorney-client privilege includes only communications between an attorney and the client, work-product privilege is broader and includes materials prepared or collected by persons other than the attorney with an eye towards impending litigation. Examples of potential work products produced by attorneys in the context of an investigation include investigative work plans, interview outlines, memoranda summarising witness interviews and investigative reports.

As a practical matter, employees should be aware that communications with other employees or colleagues regarding the investigation are not privileged regardless of whether the colleague is also involved in the investigation or represented by the same counsel. Even if an employee believes he or she is sharing attorney communications with other employees who need to know the attorney's advice and who also have attorney-client privilege with the same counsel because he or she is involved or implicated in the investigation and also represented by company counsel, it is always prudent to refrain from sharing privileged information. If an attorney's communication is shared beyond those who need to know, attorney-client privilege may be destroyed.

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?

## 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

## Poland

## Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

This is not regulated by law and it depends on internal procedures or practice at a given working establishment. As a rule, the participation of third parties or proxies is neither a recognised practice nor recommended (according to the principle that the fewer people participate in the investigation, the easier it is to determine the circumstances of the case, the so-called need-to-know rule). However, in certain situations it should be permissible for a proxy (eg, a lawyer) to participate in a meeting with a subject.

Last updated on 20/04/2023

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*
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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.

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[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

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

Employees generally have no automatic right to counsel in connection with an internal investigation, unless contractually provided for under the terms of an employment agreement. Nonetheless, employees may choose to retain counsel, particularly if they face liability.

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?

## 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

## Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

There is no such obligation, unless it is provided for in an internal procedure or, for example, in the applicable collective bargaining agreement. It is neither a recognised practice nor recommended that such persons participate in the investigation.

However, in the event of violations that justify the termination of an employment contract with the employee, the employer should consult with that employee's union about their intention to immediately terminate any employment contract concluded with that person or to terminate, with notice, the employment contract agreed with him or her for an indefinite term, or apply for consent to terminate the employment contract with an employee who is protected by a union.

Last updated on 20/04/2023

## 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

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

Employers generally have no obligation to inform employees of their right to union representation or to ask if they would like a union representative present during the interview. Union employees may insist, however, that a union representative attend any investigatory interview that could lead to the employee's punishment, although the union representative may not interfere with the interview.

Last updated on 15/09/2022

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

### 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

### Poland

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They may be supported by, for example, allowing an alternative work environment (eg, remote work to avoid direct contact with people involved in the case). Depending on circumstances of the case, this solution will be offered to the subject or the victim. However, it is important that such actions do not infringe the rights of other people (eg, the subject itself).

Employees may also be sent on leave (by a unilateral decision of the employer – if possible under currently binding law provisions) or the parties to an employment contract may mutually agree to use such leave. Moreover, if they employer thinks it is necessary, they may assign the employee to another job for a period not exceeding three months (only if it does not result in a reduction in the employee's remuneration and corresponds to the employee's qualifications).

Also, depending on the employer's decision – psychological or even legal assistance can be provided by the employer to a whistleblower or a victim.

Last updated on 20/04/2023

### 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]

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[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

## United States

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The employer's counsel should provide an *Upjohn* warning at the start of any interview, and delivery of the warning should be documented by a note-taker. An *Upjohn* warning is the notice an attorney (in-house or outside counsel) provides a company employee to inform the employee that the attorney represents only the company and not the employee individually.

Last updated on 15/09/2022

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

## 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

## Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

It depends on the circumstances of the revealed issue and the employer's compliance culture. Normally, if a new issue is revealed during the investigation, it should be analysed and investigated if appropriate.

Last updated on 20/04/2023

## 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

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
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Where new issues or claims arise during an ongoing workplace investigation, the investigator should discuss with in-house counsel whether the new issues or claims should be separately investigated and if so, by whom, or if instead those new issues or claims are sufficiently related to the current review that they can be investigated in parallel and incorporated into the ongoing fact-gathering process.

Last updated on 15/09/2022

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

## 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

## Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

It depends on the internal policies in force in the organisation. Most often, it constitutes the basis for separate proceedings.

Last updated on 20/04/2023

## 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

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

Where an employee who is the subject of a workplace investigation raises his or her grievance during the investigation, the investigator should follow the same steps outlined above to triage new issues or claims. The investigator should also discuss with in-house counsel whether any particular steps should be taken to avoid the perception that any disciplinary measures taken against the employee (in the event the original claims are substantiated) were retaliatory.

Last updated on 15/09/2022

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

## 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

## Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

This may prolong the investigation, as the employee may be unable to participate for a time (if the employee is not able to work, in many cases he or she will not be able to participate in proceedings that requires some level of engagement and psychophysical ability). Also, an employee is protected against termination of an employment contract with notice during sick leave. During such a period, the employer may only terminate his or her employment contract without notice (with immediate effect).

Last updated on 20/04/2023

## 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).

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[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

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

If an employee who is the subject of a workplace investigation becomes sick during the investigation, the investigator should complete as much of the process as possible in the employee’s absence, for example by conducting interviews with the complainant and other witnesses and collecting and reviewing relevant documentation. Where the employee’s absence is expected to be short-term, the employer can postpone completing the investigation until the employee returns to work and can be interviewed. Where a lengthy absence is expected, the investigator should take steps to ensure that the employee nevertheless has a fair chance to participate in the process, for example by providing the employee with flexibility in scheduling his or her interview or by offering other accommodations such as conducting the interview by video conference instead of requiring an in-person interview, or alternatively meeting in a neutral place

instead of the office. It is important to maintain records of the steps taken to accommodate the employee to show that the process was reasonable and fair.

Last updated on 15/09/2022

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

### 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

### Poland

Author: *Wioleta Polak, Aleksandra Stępniewska, Julia Jewgraf*
at WKB Lawyers

They can be run in parallel. It is up to the company whether it informs the authority about the ongoing internal investigation.

Based on our experience in criminal matters, a report from an internal investigation may not necessarily be treated as evidence per se, but as a source of information about the evidence.

According to procedural rules stemming from, for example, the Criminal Procedure Code, the authorities can demand to see evidence and documents in the employer's possession that they consider relevant to the conducted proceedings and their subject matter.

Last updated on 20/04/2023

### 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).

Last updated on 15/09/2022

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
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Employers have obligations to conduct a thorough and unbiased internal investigation and take prompt remedial action to prevent further workplace violations. As such, absent a criminal or regulatory investigation where the investigators ask the employer to pause an internal investigation, employers should be prepared to continue their internal investigation in parallel with the criminal or regulatory investigation while cooperating with police or regulatory investigators.

The police and the regulator can often compel the employer to share certain information gathered from its internal investigation. In some cases, the employer should analyse whether the non-disclosure of information evidencing criminal conduct within the company itself constitutes an independent crime or whether an applicable statute or regulation imposes an independent duty to disclose. Alternatively, the employer should consider whether, even absent an affirmative duty to disclose, disclosure of information gathered during an internal investigation may still benefit the employer.

Last updated on 15/09/2022

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

## Nigeria

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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

## Poland

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He or she must be given feedback about follow-up actions that were undertaken, or reasons why the follow-up actions were not undertaken.

In any case – the feedback must be adapted to the circumstances of each case so as not to reveal too many details or infringe the other interested parties' rights.

Last updated on 20/04/2023

## Switzerland

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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]

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[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

## United States

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In general, it is often helpful to provide the complainant and subject of the complaint with a short written communication or verbal communication at the end of an investigation to advise that the investigation has concluded. Where the allegations are unsubstantiated, the communication should convey that no evidence of misconduct or unlawful conduct was found. Where the allegations are substantiated, the results and proposed communication should be reviewed with the legal function, together with potential disciplinary and remedial action, before it is communicated to the complainant and the subject of the complaint.

Where the misconduct alleged poses a high risk to the company from a reputational, operational or legal perspective, and especially where an investigation is conducted by outside counsel, outside counsel should determine, in consultation with the relevant individuals at the company, for example the general counsel, how and with whom to share investigation results and if and how to communicate the outcome to the complainant and the subject of the complaint. This is the case regardless of whether the allegations are found to be substantiated or unsubstantiated.

Last updated on 15/09/2022

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

## Nigeria

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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

## Poland

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It does not need to be shared with the employees at all. It may be shared only to the extent such a disclosure will not violate any law, including personal data protection law or personal rights.

Last updated on 20/04/2023

## 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]

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[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

## United States

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Only the findings should be shared with the complainant and the subject of the complaint.

Last updated on 15/09/2022

# 24. What next steps are available to the employer?

## Nigeria

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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.

Last updated on 15/09/2022

## Poland

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It depends on the outcome of the investigation: imposing penalties; reporting to a regulator; notifying a suspected offence or civil claim; termination of an employment contract with or without notice; and changes to the work organisation. Following the investigation, the employer must make some legal, business or HR corrective actions.

Last updated on 20/04/2023

## Switzerland

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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.

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[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 180 et seq.

Last updated on 15/09/2022

## United States

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Where the misconduct alleged is substantiated in whole or in part by an internal investigation, the human resources function, potentially in consultation with in-house or outside counsel, should agree on disciplinary or remedial action to be implemented.

Last updated on 15/09/2022

# 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?

## Nigeria

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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.

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## Poland

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It depends on the matter. In general, there is no obligation to disclose the report. In some instances, there is an obligation to notify a suspected offence (for example, a terrorist attack or a political assassination). This, however, does not mean there is an obligation to file a report from the internal investigation, but to provide the law enforcement authority with the facts and evidence at the notifier's disposal. In other instances of criminal offences, for example corruption, there is no obligation to notify law enforcement authorities. Therefore, it is up to the organisation to decide whether it will file a notification for a suspected offence.

At the same time, presenting a report from an internal investigation can constitute an element of defence for an organisation if a regulatory authority initiates proceedings regarding a failure by the organisation to comply with regulatory obligations.

Records of interviews do not need to be produced for the case file provided the law enforcement authority does not ask for them.

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## Switzerland

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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]

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[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.

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## United States

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Once fact-finding is complete, the investigator should discuss his or her notes with in-house or outside counsel and prepare a summary of the process, high-level findings, and a proposed resolution at the counsel's direction. This report should not include subjective commentary and should also avoid including excessive detail, and generally be treated confidentially during and after the investigation. If the report is requested by regulators or the police, the company should discuss with in-house counsel, and preferably also with outside counsel, how to respond to the request and whether any steps need to be taken to protect any applicable legal privilege.

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

## Nigeria

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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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## Poland

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Neither Polish law nor the Draft Law specifically provide for a mandatory period during which the outcome of the investigation should be kept on the employee's record.

At the same time, the Draft Law indicates that the register of whistleblowing reports, which should also contain information about follow-up actions undertaken as a result of the report, should be kept for 15 months starting from the end of the calendar year in which the follow-up actions have been completed, or the proceedings initiated by those actions have been terminated.

Also, while determining how long the outcome of an internal investigation should be kept, additional legal considerations can be taken into account, especially data privacy.

The GDPR does not specify precise storage time for personal data. The employer must assess what will be an appropriate time for storage of the data, taking into consideration the necessity of keeping personal data concerning the purpose of the processing in question. Employees' personal data should be kept for the period necessary for the performance of the employment relationship and may be kept for a period appropriate for the statute of limitations for claims and criminal deeds. A longer retention period may result from applicable laws. Following the Regulation of the Minister of Family, Labour and Social Policy on employee documentation, the employer may keep a copy of the notice of punishment and other documents related to the employee's incurring of disciplinary responsibility in the employee record.

There are different retention periods for the data contained in employee files:

- 10 years if the employee was hired on or after 1 January 2019;
- if the employment relationship began between 1 January 1999 and 1 January 2019, the retention period is 50 years, but may be reduced to 10 years if the employer provides the Polish Social Insurance Institution with certain mandatory information; and
- for 50 years if the employee was hired before 1 January 1999. It does not matter whether the person is still working or not.

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## Switzerland

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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]

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

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## United States

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There is no requirement for the results of a workplace investigation to remain on an employee's record for any specific period. It is often helpful, however, for information relating to the outcome of such an investigation (regardless of whether the allegations are substantiated) to be accessible to the human resources or legal functions such that during the initial complaint intake process described above, any prior complaints and investigations relating to the same individual or group of individuals can be taken into account to identify any recurring issues or systemic violations.

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

## Nigeria

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

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## Poland

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If any untrue allegations were made by an employer against an employee without checking them beforehand, there is a risk that such an employee would claim damages eg, for infringement of personal rights or even filing a private indictment for defamation or outrage.

Certainly, an employer must be aware that one must never behave in a way that, for example, in the employee's opinion, could constitute a form of blackmailing or deprivation of liberty. A problem may also arise when accessing the employee's correspondence, especially when access is made to documents or private correspondence. The Draft Law provides for several criminal offences related to, for example, preventing reporting, using retaliatory measures against a whistleblower or disclosing personal data of a whistleblower).

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## Switzerland

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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]

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[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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## United States

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The subject of the investigation, the complainant, or a government agency investigating the same alleged misconduct could subject the employer to legal exposure. It is, therefore, helpful for a company to prepare a contemporaneous report of the investigation that summarises: the incident or issues investigated, including dates; the parties involved; key factual and credibility findings; employer policies or guidelines and their applicability to the investigation; specific conclusions; the party (or parties) responsible for making the final determination; issues that could not be resolved through the internal investigation; and

employer actions taken.

The employer should also maintain a clear record of the steps taken to investigate the alleged misconduct and any findings, as well as all evidence gathered during the investigation, including documents collected and reviewed, any work done to identify systemic issues or patterns of behaviour, and notes from all interviews, which should be limited to the facts gathered, dated and should indicate the duration and location of the interview.

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