International Employment Lawyer

Workplace Investigations

Contributing Editors

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01. What legislation, guidance and/or policies govern a workplace investigation?

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 Kingdom

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In the UK, the primary employment legislation of relevance to a workplace investigation includes the Employment Rights Act 1996 (ERA 1996), the Equality Act 2010 (EA 2010), and the Employment Relations Act 1999 (ERA 1999).

Other legislation includes the retained EU law version of the General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA 2018), the Investigatory Powers Act 2016 (IPA 2016) and the Investigatory Powers (Interception by Businesses etc for Monitoring and Record-keeping Purposes) Regulations 2018 (IP Regs 2018), and the Humans Rights Act 1998 (HRA 1998).

In terms of guidance, the Advisory, Conciliation and Arbitration Service (ACAS) have produced a Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code) as well as a Guide to conducting workplace investigations. The Information Commissioner's Office (ICO) have their Employment Practices Code, and other pieces of guidance on the data protection aspects of investigations (see question 7).

Most employers will have internal policies governing how workplace investigations should be conducted. The level of detail may vary considerably; public sector and regulated employers may be more prescriptive in their policies, which may even have contractual force. There may also be provisions of the employment contract that are relevant (particularly as regards suspension – see question 3).

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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?

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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 Kingdom

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The trigger could come from several sources, such as a grievance from a current or former employee, a complaint from external sources, a whistleblowing disclosure, or as the result of internal governance measures.

In each case, the employer will need to decide if an investigation is warranted. It may be required by internal policies or regulatory requirements in some circumstances. Consideration must be given to whether an investigation is feasible; for example, is the evidence still in existence and accessible? Are key witnesses still employed or contactable?

If the employer concludes that an investigation is warranted, it should start without unreasonable delay. The first step would usually be to set terms of reference, which outline the purpose and remit of the investigation. These should be closely drafted and continually referred to, to avoid the investigation's scope expanding when new points arise (as they almost always will). An investigator will also need to be appointed (see question 4).

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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)?

Poland

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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 Kingdom

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In the UK, suspension is not seen as a neutral act, so should not be a default approach at the start of an investigation. It may be appropriate if, for example, there is a risk to the health and safety of the employee in question (or any other employee), a risk that their continued presence in the business could prejudice the investigation, or risk of continued wrongdoing.

The employer should always check the individual's employment contract to see if it contains the power to suspend. Suspension should generally always be with pay to avoid any breach of contract. It should also be regularly reviewed and kept to a minimum duration.

Employers should not suspend employees under investigation as a knee-jerk reaction to bare allegations. There must be at least some evidence to support the need for suspension (which may require a preliminary investigation before deciding to suspend). Alternatives to suspension should always be considered, such as a temporary transfer to a different area of work, if the employee agrees or it is otherwise permitted by their contract.

If authorities such as regulators or prosecutorial agencies are involved in the investigation, they may have an opinion about an employee's suspension, particularly if they wish to conduct interviews. Consider whether or not to involve the authorities in the suspension discussions at an early stage.

ACAS have produced a guide to suspension during investigations (last updated Sept 2022) which gives further guidance on these issues.

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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?

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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 Kingdom

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The investigator would typically be a line manager or HR representative. Complex cases, particularly if criminality is suspected, or cases where a senior employee is accused of misconduct, may require the investigator to be someone more senior within the organisation, or someone from the in-house legal team. Employers should bear in mind the need for someone more senior than the investigator to act as a disciplinary decisionmaker, if disciplinary action is found to be warranted.

Check the organisation's policies and procedures, which may stipulate who can act as an investigator.

The investigator should be someone without any personal involvement in the matters under investigation, or any conflict of interest, but with sufficient knowledge of the organisation and where possible with both training and experience in conducting investigations.

The business should consider how any prospective investigator may appear if they are called as a witness in court, or to give evidence before any governmental committee or regulatory panel. They should also consider whether the employee accused of wrongdoing should have any say in the choice of investigator; this would not typically occur, but having the employee's buy-in can increase the chances of a successful outcome to the investigation.

It is becoming increasingly common for businesses to use an external consultant or lawyer to conduct workplace investigations. This may be beneficial where it is not operationally viable within the employer organisation to have a different person conducting the investigation and the disciplinary hearing, or if the investigation is particularly sensitive or complex, or relates to a very senior employee. If an external investigator is appointed, the employer remains responsible for that investigation.

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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?

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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 Kingdom

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Not usually, unless the investigation is being conducted in breach of a contractual policy (as sometimes happens in the NHS, for example), or if the investigation is not adjourned pending the outcome of criminal proceedings, and the employee can show that failure to do so is a breach of either an express term or the implied term of trust and confidence. The latter would be rare, but possible if the employee can demonstrate a real danger of a miscarriage of justice (see question 21).

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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?

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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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United Kingdom

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Employees may be reluctant to be interviewed or act as witnesses as part of an investigation, perhaps due to fear of reprisals. The investigator should discuss any concerns with the employee and attempt to alleviate any fears.

In general terms, an employer should not compel any employee to provide a witness statement. There may be circumstances in which this could be seen as a reasonable management instruction (and any refusal to comply treated as a disciplinary matter), but these will be rare. Evidence that is compelled is unlikely to be particularly useful to the investigator.

It may be possible to establish an express or implied obligation for senior managers to report on another employee's misconduct – as a feature of either their employment contractual duties, their fiduciary duties or their implied duty of fidelity. However, it is unlikely, in the absence of an express obligation, that a junior employee would be compelled to give evidence against a colleague.

Employees who act as witnesses benefit from their usual employment protections, and must be treated as per their contractual and statutory rights, as well as any policy governing the investigation. If the investigation involves allegations which could involve discrimination, the EA 2010 extends protection from victimisation to “giving evidence or information in connection with proceedings under this Act”. Witnesses should therefore not be subject to any detrimental treatment because they have acted as a witness in this

type of investigation. Witnesses may also be entitled to protection as whistleblowers if their evidence amounts to a protected disclosure (see question 9).

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United States

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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?

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.

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[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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United Kingdom

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Most forms of workplace surveillance involve the processing of personal data that is regulated by the UK GDPR and DPA 2018. The UK GDPR requires that personal data must be processed lawfully, fairly and in a transparent manner; it also must be adequate, relevant and limited to what is necessary concerning the purposes for which it is processed.

Employers should ensure that they have undertaken a data protection impact assessment (DPIA) to document the lawful basis for processing data, and informed employees that their files may be searched before proceeding. They should also ideally have a clear policy on the use of electronic communications systems, detailing when, how and for what purpose they may be monitored by the employer. In Q3 2023 the ICO produced new guidance on monitoring workers (https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/employment/monitoring-workers/) and on email and security (https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/security/email-and-security/) which employers should bear in mind during investigations. Employers should also be prepared to make the data collected through employee monitoring available to employees, should the employee submit a data subject access request under the DPA 2018.

The IPA 2016 makes it unlawful in certain circumstances to intercept a communication (such as one on an employer’s telephone or computer network) in the course of its transmission in the UK. The IPA Regs 2018 set out the circumstances where, in a business context, such interception will be lawful. These include monitoring or recording communications without consent to: establish the existence of facts; ascertain compliance with the regulatory or self-regulatory practices or procedures relevant to the business; ascertain or demonstrate standards which are or ought to be achieved by persons using the system; and prevent or detect crime.

Covert surveillance can lead to a breach of an employee's right to privacy under the HRA 1998. The

employer will need to consider if covert surveillance is proportionate, which will depend on the facts of each case. Employers should be careful not to use the investigation as an excuse to undertake a "fishing expedition", and should avoid gathering material that is obviously personal, such as private messages and diary entries (see question 8).

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United States

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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?

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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]

[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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United Kingdom

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It may sometimes be difficult to draw a clear distinction between the property of the employer and employees' personal property, both physical and electronic, particularly where employees are increasingly working from home. Employers should ideally have a clear policy to delineate what is the employer's property.

Employees typically have a reasonable expectation of privacy at work, although how far this extends will depend on the circumstances of each case and the employer's policies.

When it comes to employees' personal possessions, a search should only be conducted in exceptional circumstances where there is a clear, legitimate justification. The employer should always consider whether it is possible to establish the relevant facts through the collection of other evidence. Even if the employee's contract specifies that it is permitted, employers would usually require explicit employee consent for the search to be lawful. The employee should be invited to be present during the search; if this is not feasible, another independent third party (such as a manager) should be present.

If the employee refuses to consent to a search of their personal possessions, their refusal should not be used to assume guilt; the investigator should explore why the employee has refused and seek to resolve their concerns if possible.

If the employer believes that a criminal offence has been committed it should consider involving the police, since they have wider powers to search individuals and their possessions.

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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.

Last updated on 15/09/2022

09. What additional considerations apply when the investigation involves whistleblowing?

Poland

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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.

Last updated on 15/09/2022

United Kingdom

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The employer should first identify which individuals may have protection as whistleblowers. This could be a

current or former employee who raises the initial complaint, a co-worker who gives evidence as part of the investigation, or the accused employee.

In each case, consider whether a “protected disclosure” has been made (under Part IVA ERA 1996). This requires analysis of the subject matter of the disclosure, how it is made, and a reasonable belief that it is made in the public interest.

Employers must then ensure there is no detrimental treatment or dismissal of any worker on the grounds of their protected disclosure. Although the causation test for these purposes is not straightforward, as a general rule if the protected disclosure has a “material influence” on the decision to discipline or dismiss, there may be liability. Individual managers may be personally liable alongside the employer. Compensation for whistleblowing cases is uncapped, meaning businesses and individuals can face significant financial and reputational exposure.

What this means in practical terms is that the employer should promote a “speak-up” culture and, where protected disclosures are made, ensure they are handled by a team who are properly trained in how to do so.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

10. What confidentiality obligations apply during an investigation?

Poland

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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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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 Kingdom

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Workplace investigations should usually be conducted on a confidential basis, so that only those involved in the investigation are aware of its existence and subject matter. The need to maintain confidentiality about both the fact of the investigation, and any content discussed with an investigator, should be emphasised to all those involved. It may also be necessary to explain that a breach of confidentiality could be viewed as a disciplinary matter. Appropriate exceptions must, however, be made to allow employees to speak to any relevant employee or trade union representative, legal adviser and potentially the police or other regulators. Confidentiality provisions cannot override the rights of workers to make protected disclosures (see question 9).

In some situations, such as those involving a wide-ranging investigation into the organisation's working practices and culture, it may be more appropriate to investigate a more "open" basis, and inform

employees and other stakeholders.

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United States

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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?

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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.

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Switzerland

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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).

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[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.

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United Kingdom

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at Slaughter and May

The employee must be able to effectively challenge the allegations against them. They should be given the terms of reference for the investigation, and any relevant documentary evidence, including copies of witness statements.

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United States

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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.

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

Poland

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Yes.

Last updated on 20/04/2023

Switzerland

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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 Kingdom

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Only in exceptional circumstances, such as where there is a genuine risk of retaliation. Anonymising a complaint puts the employee under investigation at a significant disadvantage, as they may be unable to properly challenge the evidence against them. It can also impair the effectiveness of the investigation. Employers should, therefore, not provide any guarantees of confidentiality to complainants or to employees who are to act as witnesses. That said, employers should think carefully about any necessary disclosure of names or facts. This can be particularly relevant where the witness is subordinate to the employee being investigated.

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United States

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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?

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

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Switzerland

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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.

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United Kingdom

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Only to a limited extent. As a matter of law, NDAs cannot prevent a worker from making a protected disclosure, or reporting a crime to the police. As a matter of the regulatory obligations of solicitors, NDAs should not be used in other ways, including as a means of influencing the content of disclosures, or by using warranties, indemnities and clawback clauses in a way that is designed to, or has the effect of, improperly preventing or inhibiting permitted reporting or disclosures (see the SRA's warning notice on the use of NDAs).

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United States

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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.

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14. When does privilege attach to investigation materials?

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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.

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Switzerland

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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 Kingdom

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There are two limited types of privilege which may be relevant to investigations:

- Legal Advice Privilege (LAP), which protects communications between lawyers and their clients provided they are confidential and made for the dominant purpose of obtaining or giving legal advice; and
- Litigation Privilege (LP), which can extend to communications between a lawyer and client or third parties, but only where the dominant purpose of the communication is to prepare for or conduct existing or contemplated litigation.

If the relevant tests for privilege are met and apply to materials generated in the course of the investigation, the employer retains greater control over their subsequent disclosure to third parties. The materials would, for example, be protected against disclosure in any subject access request under the DPA 2018.

That said, privilege can be difficult to maintain in investigations, particularly where litigation is not active or in contemplation. Interview notes and witness statements may not attract privilege, particularly if these were conducted with employees who do not fall within the narrow definition of “the client” for LAP purposes (which is limited to employees who are capable of seeking and receiving advice on behalf of the employer).

If privilege applies to investigation materials, the investigator should keep tight control on what documents are created and how they are circulated, to avoid inadvertent disclosure and potential waiver of privilege.

Bear in mind that even if privilege applies to certain investigation materials, there may be a need to create disclosable documentation at a later stage, particularly if there is a decision to instigate disciplinary action.

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United States

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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?

Poland

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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.

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Switzerland

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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.

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United Kingdom

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There is no statutory right to be accompanied at a disciplinary investigation meeting; the right only applies to disciplinary hearings (section 10 ERA 1999). There is, however, a right to be accompanied by a colleague or trade union representative at any grievance investigation meeting, under section 10, although this is only in respect of the person who raises the grievance (not any person who is the subject of the grievance or other witnesses).

That said, the employer’s policies and contracts should be checked to see if they contain a broader right to be accompanied. Employers may also need to allow a broader right to be accompanied as a reasonable adjustment for disabled employees (for example, to allow family members or medical professionals to be present). Equally, where the allegations are sufficiently serious (eg, criminal, especially if the findings are likely to be shared with the police), it may be appropriate to allow legal representation during the investigation.

Last updated on 15/09/2022

United States

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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.

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16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?

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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.

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Switzerland

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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.

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United Kingdom

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Aside from the statutory right to be accompanied (see question 15), any further involvement by the works council or trade union would depend on the terms of the relevant works council or trade union recognition agreement.

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United States

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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.

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

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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

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

In addition, a company may appoint a so-called lawyer of confidence who has been approved by the employer and is thus subject to professional secrecy. This lawyer will not be involved in the internal investigation but may look after the concerned employees and give them confidential advice as well as

inform them about their rights and obligations arising from the employment relationship.[2]

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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.

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United Kingdom

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The employer needs to consider the health and wellbeing of all staff involved in the investigation, since this can be a very stressful process. The employer and investigator can assist by ensuring that all parties are aware of what is expected of them. Timings are also important; having a clear and expeditious timetable and providing updates if the timetable slips will help. Regular catch-ups by managers can be used to monitor how employees are coping. They should be reminded about any resources to help support them, such as employee helplines or employee assistance programmes.

Where an employer has particular concerns about an employee's health, a referral to occupational health can assist. The employer may also wish to consider whether employees should be given additional time off, or whether any other adjustments can be made to the investigation process. For particularly serious allegations, the employer may consider facilitating the provision of independent legal advice for the employee, or making a contribution towards legal fees.

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.

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

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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.

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Switzerland

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

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United Kingdom

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These should typically be disregarded by the investigator. From a data protection perspective, the ICO’s position is that other information collected during an investigation should be disregarded and, where feasible, deleted unless it reveals information that no reasonable employer could be expected to ignore. In those circumstances, the employer should arrange for an independent third party to determine whether a separate investigation into unrelated matters is needed.

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United States

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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?

Poland

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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

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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).

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United Kingdom

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This is a relatively common tactic. The employer will need to decide whether to suspend the investigation to deal with the grievance, or conclude the investigation first, depending on the circumstances. It would usually be difficult to deal with both the grievance and the investigation concurrently, unless the facts overlap significantly.

If the employee becomes uncooperative and refuses to take part in the investigation, they should be told that the investigator may need to make a decision in the absence of their account based on all the other evidence available. The employer may decide to treat it as failure to comply with a reasonable management instruction and take disciplinary action on that basis.

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United States

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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?

Poland

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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).

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Switzerland

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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 Kingdom

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This is a relatively common occurrence. It would usually be appropriate to suspend the investigation temporarily, to determine how serious the health issue is and when the employee may be fit to return. The investigator should consider what adjustments or allowances can be made to progress the investigation despite the employee’s absence. If their evidence has not yet been gathered, the employee may be invited to provide a written statement instead of attending an investigation meeting, or the meeting could be held remotely or at a neutral location. If none of this is possible, it may be difficult to fully conclude the

investigation.

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United States

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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.

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

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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.

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Switzerland

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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).

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United Kingdom

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This situation needs to be handled with caution. It is important to remember that regulatory or criminal proceedings, and employment proceedings, are separate; while there may be an overlap of alleged misconduct, they are usually addressing different questions, with different standards of proof. The outcome in one should not, therefore, be treated as determinative of the other.

Where the employee is suspected of, charged with, or convicted of, a criminal or regulatory offence, the employer should still investigate the facts as far as possible, come to a view about them and consider whether the conduct is sufficiently serious to warrant instituting the disciplinary procedure.

In terms of timing, there are no concrete rules governing how an employer must proceed in the circumstances of a parallel criminal investigation. Much will depend upon the circumstances of the case, the length of delay, the size of and resources available to the employer, and the preferences (if expressed) of the external authority. If the employer is concerned about prejudicing the regulatory or criminal proceedings or otherwise prefers to wait for their conclusion before instigating internal proceedings, they are unlikely to be criticised for delaying. The accused employee may also be advised not to provide a statement in the workplace investigation for fear of a negative impact on the criminal investigation. This would make it difficult to proceed with the workplace investigation, unless the employer is confident it has strong enough evidence to justify any disciplinary action subsequently taken.

On the other hand, regulatory or criminal investigations may take months or years to progress; it may not be realistic for the employer to keep any investigation in abeyance for so long. This is particularly true when the accused employee is suspended on full pay, witness recollections will grow less reliable, and the alleged victim may feel unable to return to work until the matter is resolved.

In these circumstances, the employer may continue with their investigation if they believe it is reasonable to do so, and consultations have commenced with the external agency. The court will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger that there would be a miscarriage of justice in the criminal proceedings.

Employers should consider carefully whether and when to involve the police in allegations of employee misconduct. Employers must be careful not to subject their employees to the heavy burden of potential criminal proceedings without the most careful consideration, and a genuine and reasonable belief that the case, if established, might justify the epithet “criminal” being applied to the employee's conduct.

Where the police are called in, they should not be asked to conduct any investigation on behalf of the employer, nor should they be present at any meeting or disciplinary meeting. The employer should, however, communicate with the police to see if they have a strong view about whether the internal process should be stayed, or whether they should interview witnesses first.

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United States

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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?

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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.

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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.

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United Kingdom

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The employee would usually get a copy of the investigation report (which would typically have the relevant evidence considered by the investigator annexed to the report, unless the report is privileged). It is not usual practice to allow the employee to make representations on the report before it is finalised.

The report will set out what facts the investigator was able to establish by reference to the available evidence. The investigator's role is to gather and consider evidence about what did or did not happen, so the employer can understand if there is a case to answer. This is distinct from determining culpability, which is something for the manager conducting the disciplinary hearing (not the investigator) to determine, in addition to deciding any disciplinary sanction.

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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.

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

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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.

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Switzerland

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In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).[1] Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.[2]

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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).

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United Kingdom

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The answer to this depends on whether or not privilege attaches to the report, as well as whether criminal proceedings are contemplated – if so, there may be a danger of waiver of privilege, or witness evidence being contaminated if they have an opportunity to read each other's evidence as part of the report. This could inhibit the fairness of any subsequent criminal trial.

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United States

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

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24. What next steps are available to the employer?

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.

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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.

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United Kingdom

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The investigator may recommend further action, but should not decide whether allegations are true, or suggest a possible sanction or prejudge what the outcome of any subsequent disciplinary process would be.

The employer will need to consider whether it is necessary to commence disciplinary proceedings. For regulated businesses, there may be an obligation to inform their regulator of the investigation outcome. In some circumstances, the employer may feel the need to make an internal or external announcement about the outcome, and any action it intends to take to implement any recommendations made by the investigator. There may also need to be certain updates to policies or procedures as a result of the investigation.

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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.

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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?

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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]

[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 Kingdom

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Primarily, the investigation findings are disclosed to the employer and the employee under investigation. In scenarios involving allegations of a breach of regulatory duty or criminal law, the authorities may have the power to compel disclosure of any non-privileged materials generated in the investigation. Powers of compulsion do not apply to privileged materials.

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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?

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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 Kingdom

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The investigation outcome may not need to be noted on the accused employee's record at all. Usually only the outcome of any subsequent disciplinary or grievance process would be noted, rather than the prior investigation.

The employer should keep the investigation report for as long as it remains relevant. This would usually be no longer than six years, unless regulatory obligations dictate otherwise. The report along with all documentation and witness statements gathered during the investigation should be retained securely and confidentially but for no longer than is absolutely necessary under the requirements of the DPA 2018 and the employer's data protection policies and procedures. There may be additional retention requirements in a regulated context; the position for each particular business and employee should be checked.

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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?

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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 Kingdom

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A reasonable investigation is a key component of a fair disciplinary process. Errors in the investigation could therefore expose the employer to liability for unfair dismissal under ERA 1996.

Failure to follow the ACAS Code does not automatically make an employer liable in any proceedings taken against it. However, an employment tribunal will take the ACAS Code into account when deciding whether an employer has behaved fairly, and has the power to increase awards by up to 25% where it believes an employer has unreasonably failed to follow the ACAS Code's provisions.

There may be liability for breach of the employee’s contract of employment if the employer breaches

aspects of the investigation policy that are contractual, any contractual provisions relating to suspension, or otherwise conducts the investigation in a manner that breaches the implied term of trust and confidence.

There may be liability under the EA 2010 if the investigation is conducted in a discriminatory manner, which could include not making reasonable adjustments to the process for disabled employees.

Where the investigation involves protected disclosures, there may be liability under the whistleblowing provisions of ERA 1996 if the whistleblower is subjected to detriment or dismissal on the grounds of their protected disclosures.

Improper evidence gathering or processing may be actionable under the DPA 2018, IPA 2016 or the IP Regs 2018.

Finally, there may be common law claims in some circumstances (for example where reports need to be made to regulators, which in turn may affect the relevant employee's future employment prospects) for defamation, or, more unusually, for stress-related personal injury.

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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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