

Workplace Investigations

Contributing Editors

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

Belgium

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There is no specific legislation regarding a workplace investigation. In general, an employer has the right to investigate incidents at the workplace based on their authority over employees. However, the investigative powers of the employer are among others limited by the general right to privacy, which is also enshrined in Collective Bargaining Agreement No. 81 of 26 April 2002 to protect the privacy of employees concerning the control of electronic online data. If there are official complaints by employees due to sexual harassment, bullying or violence at work, well-being legislation provides a specific procedure. Also, upcoming whistleblower rules include some specifications for an investigation, but at the time of publication these are not yet final (we refer to is in more detail below). The information below is only valid for workplace investigations in the private sector. The public sector has a set of specific rules and principles, which are outside the scope of this chapter.

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South Korea

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While there are no specific laws that regulate a workplace investigation, there are several laws that companies should consider when conducting a workplace investigation concerning alleged employee misconduct.

One key example is the Whistleblower Protection Act (WPA). The WPA provides legal protection to a whistleblower if their allegations are raised in good faith and are in the public interest as specified under the WPA. If the WPA applies, certain obligations apply to the company, including but not limited to the following:

- the obligation to protect the confidentiality of the whistleblower's identity;
- protecting the whistleblower if the whistleblower suffers or is likely to suffer serious harm to life or

health as a result of whistleblowing and the whistleblower requests protection; and

- refraining from taking retaliatory action on the whistleblower.

Therefore, if an employee raises allegations of another employee's misconduct, the company should review whether the allegations fall under the WPA.

There are also special laws that impose obligations on the company if there are certain types of allegations (eg, sexual harassment, workplace harassment).

In addition, when collecting and reviewing employees' electronic data, such as emails or files stored in work laptops or company servers, which may contain personal information, the company should comply with data privacy laws discussed in more detail in questions 7 and 8.

Companies may also have internal policies (eg, whistleblower protection policies, Code of Conduct) that may apply to workplace investigations, aside from the requirements under Korean law.

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Switzerland

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There is no specific legal regulation for internal investigations in Switzerland. The legal framework is derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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United States

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

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

Due to the patchwork nature of employment and related laws, it is not possible to cover every investigation scenario or related legislation in this guide. Employers should instead consult with experienced employment attorneys in their state to ensure compliance with the applicable legal and regulatory regimes.

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02. How is a workplace investigation usually commenced?



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First, the employer should appoint an investigator or investigative team that will be responsible for conducting the investigation. Next, the employer or the investigators might think about communicating with the involved employees. It depends on the situation if this is a good idea or not. In general, it can be recommended that the employer is transparent towards the involved employees and openly communicates about the (start of the) investigation process. This is definitively the case if it is already clear that the involved employees are under scrutiny because of their actions. In this case, the actual investigation can begin with a hearing of the involved employees. However, if there is a risk that employees will hide or destroy evidence or will collude to prevent the employer from finding the truth, the investigation can also start without any communication. In this case, it would be better to start collecting evidence before hearing from the employees involved.

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South Korea

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There are many different ways a workplace investigation concerning employee misconduct could commence. Below are some key examples from our experience:

- an employee reports allegations concerning another employee's misconduct through an ethics hotline or other means (eg, email, phone call);
- an outsider such as a former employee or a vendor reports allegations concerning employee misconduct to a company officer;
- an internal audit reveals potential employee misconduct;
- media reports raise allegations of employee misconduct; and
- an external investigation begins (eg, by criminal authorities or administrative agencies) concerning alleged employee misconduct.

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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 exist, 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.[\[2\]](#)

[\[1\]](#) Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 21.

[\[2\]](#) Klaus Moosmayer, *Compliance, Praxisleitfaden für Unternehmen*, 2. A. München 2015, N 314.

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United States

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

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

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

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

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In principle, you cannot unilaterally suspend an employee during a workplace investigation, as there is a risk of constructive dismissal (ie, wrongful termination of the employment contract by the unilateral modification of one of its essential elements). Consequences could include the payment of an indemnity in lieu of notice based on seniority as foreseen by the Employment Contracts Act, plus possible damages (three to 17 weeks remuneration if an unreasonable dismissal, plus alternative or additional damages based on real prejudice suffered). The parties can nevertheless agree on a suspension of the employment contract. In this scenario, the remuneration will still have to be paid. Furthermore, a suspension could be a

sanction that follows the outcome of the investigation, but even then it will only be possible for a limited time (and a suspension without pay is usually only allowed by the courts for a maximum of three days). However, if the complaint is about sexual harassment, bullying or violence at work, the prevention advisor (see question 4) can recommend that the employer take certain actions, which in grave circumstances could lead to employee suspension. The suspended employee should continue to receive his pay if this occurs.

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The company may place an employee who is subject to a workplace investigation under administrative leave if this seems necessary or appropriate to ensure the integrity of the workplace investigation. While administrative leave can take different forms, one way is to issue a “standby order” to the relevant employee, instructing him or her not to come into work and prohibiting contact with other employees or customers while the workplace investigation is ongoing.

Administrative leave is not a disciplinary action, but rather an exercise of the company’s authority to take personnel management measures. This authority is generally subject to a “reasonableness” test, with the Korean courts balancing the employer’s business necessity in placing the employee on administrative leave with the inconvenience caused to the employee. In conducting the balancing test, the Korean courts have considered whether the employee receives pay during the leave and the duration of the leave, among other things. In general, if the duration of the leave is not excessive and is with full pay and benefits, the employer’s management prerogative is likely to be recognised.

The company doesn't need to obtain the employee’s consent but, in practice, a company should consider getting the employee’s acknowledgement that they have received the administrative leave notice.

In addition to Korean labour law, other factors such as the company’s rules of employment or a collective bargaining agreement (if any) may affect the company’s ability to place the employee on administrative leave, by providing for prescribed procedures for placing an employee on administrative leave or requiring the company to obtain the union’s consent if a union leader or executive is involved.

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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.

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

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United States

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

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

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



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In general, there are no legal minimum qualifications, the employer can delegate the investigation task to anyone. Of course, it is strongly recommended to appoint someone who is not involved in the case and who can lead the investigation objectively with the necessary authority to take investigative measures.

However, in the specific case of an official complaint due to sexual harassment, violence or bullying at work, the investigation will be conducted by the prevention advisor for psychosocial aspects. Next, if the investigation is based on an internal whistleblowing report, there will have to be an independent reporting manager responsible for receiving the report, giving feedback to the whistleblower and ensuring a decent follow-up to the report. Logically, the reporting manager will lead the investigation in this case, but he can be assisted by other persons or a team who are bound by a duty of confidentiality.

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While there are no laws that set minimum qualifications for who should conduct a workplace investigation, companies often engage external legal counsel to ensure the investigation is conducted in an unbiased and professional manner. If the company itself undertakes the workplace investigation, the company should take precautions such as ensuring that the person conducting the investigation is not biased and not involved in the alleged wrongdoing. If the person conducting the investigation cannot converse in the

native language of the employee under investigation, the company may consider arranging for an interpreter when conducting interviews, to minimise the risk of misunderstanding.

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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.

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

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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 only possible if the employee claims that his or her rights (eg, the right to privacy) are violated by the investigation (but this will merely limit the investigation methods) or if he or she finds that the investigation constitutes an abuse of rights. In any case, it will be very hard for an employee to completely halt the investigation.

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An employee under investigation cannot bring legal action (eg, an injunction) to stop a workplace investigation. However, there have been instances where an employee under investigation raised legal challenges concerning the investigation (eg, breach of privacy). Please see question 19. While the company would not be legally compelled to stop the investigation when legal challenges are raised, they may face penalties under the relevant laws if it is determined they have committed a violation.

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The accused could theoretically request a court to stop the investigation, for instance, by arguing that there is no reason for the investigation and that the investigation infringes the employee's personality rights. However, if the employer can prove that there were grounds for reasonable suspicion and is conducting the investigation properly, it is unlikely that such a request would be successful.

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United States

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

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06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?



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Employees cannot be forced by their employer to act as a witness. If they decide to nonetheless testify as a witness, they do not, in principle, have particular rights. If the employee puts himself in a difficult or even dangerous position to act as a witness, it is up to the employer to offer the necessary protection or take measures to prevent any harm (eg, by keeping the identity of the witness confidential or by planning the hearing at a place or time when the employees involved are not aware of it).

However, this is not the case for whistleblowing reports, where a witness might be seen as a “facilitator” who can receive protection against any retaliation by the employer.

Also, workers who were direct witnesses to official allegations of sexual harassment, violence or bullying at work are protected against retaliation by the employer. This also applies to witnesses in court.

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While there are no laws to compel co-workers to act as witnesses, the company may have internal policies (eg, rules of employment, code of conduct) that require employees to cooperate with company actions such as a workplace investigation. That said, it would be difficult to enforce such policies even if the employee refuses to cooperate (eg, taking disciplinary action against an employee who refuses to act as a witness).

There may be instances when the company is required to provide certain legal protection to employees acting as witnesses in an investigation. For example, if a whistleblower falling under the WPA is required to act as a witness, they would be entitled to legal protections as discussed in question 1. The company may also have internal policies that provide protection to employees acting as witnesses in an investigation.

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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]

^[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.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](https://www.hrtoday.ch), last visited on 17 June 2022.

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

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

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07. What data protection or other regulations apply

when gathering physical evidence?



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Here, the investigation “collides” with the right to privacy of the persons involved.

First, the rules and principles of the GDPR will apply if personal data is involved. Therefore, the employer will have to find a data-processing ground, which could be his or her legitimate interest or the fact that the investigation could lead to legal proceedings, etc. The data processing should also be limited to what is proportionate and the data subjects should be informed. Due to this obligation, it is arguable that the GDPR policy already provides the necessary information for the employees not to jeopardise the investigation. In any case, data subjects should not be able to use their right to access data to ascertain the preliminary findings of the investigation (which are confidential) or any confidential identities involved (eg, in the whistleblower procedure, the identity of the report should be protected at all times).

Also, the employer should follow the procedure of Collective Bargaining Agreement No. 81 on searching the e-mails or computer files and internet searches of employees. This CBA limits the purposes for searches and lays down a double-phase procedure that needs to be followed if private data is involved. Next to this, the employer should also take into account the case law of the European Court of Human Rights, which only allows e-mail and computer searches based on the following:

- whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and the implementation of such measures;
- the extent of the monitoring and the degree of intrusion into the employee’s privacy (including a distinction between the monitoring of the flow or the content of the communications);
- whether the employer has provided legitimate reasons to justify monitoring of the communications and accessing of their actual content; and
- whether it would have been possible to establish a monitoring system based on less intrusive measures, the consequences of the monitoring for the employee who is subject to it, and whether the employee had been provided with adequate safeguards.

Next, if the employer wants to use camera images, the rules of Collective Bargaining Agreement No. 68 should have been followed when installing cameras. If not, the images might have been collected illegally.

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It may be difficult for a company to search and collect physical items that personally belong to the employee.

While the company may search and gather electronic data, such as emails or files stored in work laptops or company servers, there are requirements and restrictions under the Criminal Code, the Personal Information Protection Act (PIPA), and the Act on Promotion of Information and Communications Network Utilisation and Information Protection, etc (Network Act), among other laws.

Article 316(2) of the Criminal Code states that accessing the contents of another person’s documents, pictures, special media records, etc, that are sealed or designated as secret using technical means may constitute the crime of accessing electronic records.

Under the PIPA, consent must be obtained from the information owner to collect or use personal information, or to provide such information to a third party. Consent must be separately obtained for sensitive information or unique identification information. There are strict requirements as to the format and contents of the consent forms under the PIPA.

The Network Act prohibits accessing an information and communications network without rightful authority or any intrusion that goes beyond the permitted authority for access. Although this may not be an issue if a company directly manages the email accounts at issue, if an employee's email account is protected by a password or through other means, accessing emails from that account without obtaining the employee's consent could constitute unlawful intrusion under the Network Act as well as under the Criminal Code as discussed above.

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Switzerland

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The Swiss Federal Act on Data Protection applies to the gathering of evidence, in particular such collection must be lawful, transparent, reasonable and in good faith, and data security must be preserved.^[1]

It can be derived from the duty to [disclose and hand over benefits received and work produced](#) (article 321b, Swiss Code of Obligations) as they belong to the employer.^[2] The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

It is advisable to state in internal regulations that the workplace might be searched as part of an internal investigation and in compliance with all applicable data protection rules if this is necessary as part of the investigation.

^[1] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 52.

^[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 148.

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

privacy during an internal investigation.

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



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The employer is, in principle, not entitled to search the employee's private possessions, except with the explicit consent of the employee. Digital files on the computer or laptop of an employee can be searched under the rules of CBA No. 81 (see question 7) and other privacy rules.

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As discussed in question 7, it may be difficult for a company to search an employee's personal possessions. The company may search and gather electronic data stored in work laptops or company servers, subject to legal requirements and restrictions (eg, obtaining consent).

The PIPA provides specific guidance on the requirements for obtaining consent. Under the PIPA, to collect or use an individual's personal information, the information holder must be informed of and consent to:

- the purpose of the collection or use;
- the personal information that will be collected;
- the period of retention and use; and
- his or her right to refuse to provide consent and any disadvantages that may result from such refusal.

There are separate requirements for obtaining consent to provide an individual's personal information to a third party. Also, consent must be obtained separately for the collection, use or provision of sensitive or unique identification information.

Under limited circumstances, personal information may be collected, used, or provided to third parties without obtaining the consent of the information holder. For instance, a company may collect and use personal information without obtaining consent where obtaining the information is necessary to achieve the company's "legitimate interests", which clearly exceed the information holder's right to his or her personal information, and the collection and use are carried out within reasonable bounds. The term "legitimate interests" in this context is generally understood as a concept similar to "justifiable act" under the Criminal Code. The Korean Supreme Court has held that under exceptional circumstances such as the following, the company's collection and review of employee data may constitute a "justifiable act" under the Criminal Code:

1. the company had specific and reasonable suspicion that the employee had committed a crime and the company had an urgent need to verify the facts;
2. the scope of the company's review was limited to the suspected crime through the use of keywords, etc;

3. the employee had signed an agreement stating that he or she would not use work computers in an unauthorised manner and that all work products would belong to the company; and
4. the company's review uncovered materials that could be used to verify whether the employee committed the alleged crime.

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

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

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

investigating employee misconduct.

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



Belgium

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If the investigation is based on a whistleblower report that falls under the scope of the upcoming rules, the investigators are bound by a strict duty of confidentiality, especially regarding the identity of the report. The rules also provide some procedural deadlines for feeding back to the reporter. Within seven days of receiving the report through an internal reporting channel, the reporting manager needs to send a receipt to the whistleblower. From that moment, the reporting manager has three months to investigate the report and give feedback and an adequate follow-up to the report. Next, the rules offer strong protection against any retaliatory measures the reporter may experience. Regardless, these rules are mostly intended to offer the necessary protection for whistleblowers and to ensure that companies take necessary investigative steps following a report, but they do not include much information about the actual procedure of the investigation besides certain deadlines, nor do they deal with other employees involved (or under investigation).

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South Korea

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Aside from the legal obligations imposed on the company when dealing with a whistleblower who is subject to the WPA as discussed in question 1, there are also practical considerations the company should keep in mind when dealing with a whistleblower, regardless of whether the whistleblower falls under the WPA.

For example, there have been instances where an employee who raised allegations filed a complaint with Korean authorities (such as the Anti-Corruption and Civil Rights Commission (ACRC) or the Labour Office) that the company took retaliatory action against the whistleblower. The company should carefully review the legal risks before taking action, such as personnel action or civil or criminal action, against an employee who raises allegations if that employee was also involved in the wrongdoing.

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Switzerland

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If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the

case if he or she is (partly) responsible for the grievance.

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United States

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Several federal, state, and local employment laws prohibit retaliation against employees who come forward with complaints or participate in corporate investigations. Employees who possess information regarding corporate misconduct may also be considered whistleblowers protected from retaliation under federal and state whistleblower laws, including but not limited to the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Consumer Financial Protection Act of 2010.

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

Last updated on 15/09/2022

10. What confidentiality obligations apply during an investigation?

Belgium

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A workplace investigation is often a sensitive matter that requires necessary confidentiality to find out the truth discreetly and objectively. Nevertheless, there is often pressure from employees, trade unions or even the media and general public to be transparent and communicate about the case. From a legal perspective, it is not recommended to communicate openly about an ongoing investigation, as this can jeopardise the investigation or the possibility of taking disciplinary measures.

Whistleblower investigations will be bound by a strict duty of confidentiality regarding anything that could reveal the identity of the reporter.

In complaints due to sexual harassment, violence or bullying at work, the prevention adviser is bound by professional secrecy. Consequently, he or she may not disclose to third parties any information about individuals that have come to his or her knowledge in the performance of his or her duties. However, he or she still has the freedom to inform the people concerned to carry out his or her tasks in the procedure.

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South Korea

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It is general practice in Korea for a company to require interviewees to maintain confidentiality concerning a workplace investigation and instruct them that they are not permitted to discuss the matter under investigation with other employees, etc. If an employee violates this instruction, it may be possible for the company to take disciplinary action against them under the company's rules.

Further, the company or its employees who have engaged in an investigation for sexual harassment or workplace harassment in the workplace are obliged to maintain the confidentiality of the investigation. Failure to comply with such requirements may lead to an administrative fine from the Ministry of Employment and Labour for the company or its registered representative.

There may be some exceptions to the confidentiality obligation, such as when an employee is required by government authorities to provide relevant information in a parallel investigation.

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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.[\[3\]](#)

[\[1\]](#) Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

[\[2\]](#) Claudia Fritsche, *Interne Untersuchungen in der Schweiz*, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 202.

[\[3\]](#) David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 133.

Last updated on 15/09/2022



United States

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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.

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



Belgium

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In general, the employee should be informed that there is an ongoing investigation (unless this could jeopardise the investigation, in which case disclosure could be postponed until this is no longer the situation). Next, before imposing measures or sanctions, the employee should be allowed to be heard or to give his or her version of the facts. Of course, the employee can only do this if he or she is aware of the facts being investigated. It is not necessary to give the employee a full insight into the investigation, only the necessary facts that allow him or her to offer a defence are sufficient.

Last updated on 15/09/2022



South Korea

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There is no requirement to notify an employee under investigation concerning the allegations against him or her when requesting cooperation with a workplace investigation (eg, requesting the employee's consent to review electronic data, or requesting an interview).

However, the company may strategically consider explaining the general purpose of the investigation before requesting consent to review electronic data or when requesting an interview. This may help increase the likelihood of cooperation and also reduce the risk of the employee raising objections to the company's findings from the investigation by saying he or she was not properly informed of the purpose of the investigation, or that the investigation was conducted in a coercive manner.

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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).

^[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 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?

Belgium

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If the complainant made use of an internal whistleblowing procedure, confidentiality regarding the identity of a reporter is mandatory. Also, in other cases and for other involved persons (witnesses), it is recommended to keep their identity confidential to prevent the risk of intimidation or other negative consequences.

In complaints due to sexual harassment, violence or bullying at work, if the prevention adviser heard or took written statements from persons that were considered useful for the evaluation, these persons may remain anonymous.

The employee must, nevertheless, receive sufficient information to be able to offer a defence concerning the facts of which he or she is accused.

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South Korea

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As discussed in question 1, if the whistleblower falls under the WPA, the whistleblower's identity should be kept confidential. Even if the WPA does not apply, the company may wish to keep the identity of the whistleblower and other key witnesses confidential to the greatest extent possible.

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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's 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]

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

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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.

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



Belgium

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In principle this is possible. However, these NDAs do have their limits and cannot prevent involved persons from, for example, bringing a legal claim or filing a report if they are legally entitled to do so. Under whistleblower rules, a reporter can even publish his or her complaint under certain circumstances.

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South Korea

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Some companies require an employee subject to investigation to sign an NDA or other similar documents (eg, a pledge of confidentiality) agreeing not to disclose information relating to the investigation to outside parties.



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 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?



Belgium

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If the investigation is conducted by a prevention advisor, the investigation and the prevention advisor are bound and protected by a professional duty of confidentiality.

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South Korea

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No law recognises the common law concept of “attorney-client privilege” in Korea. However, communication with an attorney is protected to some extent under certain laws, such as the Constitution, the Attorney Act, the Criminal Procedure Act, and the Civil Procedure Act. This protection is based on the attorney’s confidentiality obligation, which prohibits an attorney from divulging confidential matters acquired in the course of representing clients, unless otherwise prescribed by law. This confidentiality

obligation generally allows an attorney to refuse to testify or comply with document production orders for information or materials the attorney obtained in the course of his or her duties that relate to the confidential information of clients.

In addition, there could be instances where materials from an investigation conducted in Korea may become subject to discovery outside of Korea. It is, therefore, important to ensure investigation materials are privileged under the relevant non-Korean laws in the jurisdictions where attorney-client privilege is recognised (eg, the US).

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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.

^[1] Claudia M. Fritsche, *Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute*, p. 284 et seq.

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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.

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15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?



Belgium

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An employee can be assisted by a member of a trade union. They are also free to consult a lawyer.

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South Korea

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While the company cannot prevent an employee from engaging his or her legal counsel, there is no legal obligation for a company to allow an employee to bring his or her legal counsel to an interview, for example. If the employee expresses his or her intention not to participate in the interview session without his or her legal counsel, the company may consider explaining to the employee that such refusal to participate in the interview may constitute a breach of reasonable work-related orders and may be subject to disciplinary action. However, the company should consider the possibility of the employee claiming that he or she was not given a proper opportunity to explain the allegations during the investigation because they were prevented from obtaining legal assistance.

Last updated on 15/09/2022



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.

[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 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?

Belgium

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At the request of the involved employee, an employee can be assisted by a member of the trade union delegation, for example, during his or her hearing.

The works council should be informed of an investigation if there is a considerable impact on the company; this will only be the case if the investigation concerns a very serious, important or widespread issue. This information should be communicated as soon as possible and before measures are taken as a result of the investigation. This is only a right to information, not consultation. Moreover, members of the works council

may be asked to respect their duty of confidentiality. However, as the enforcement of this duty of confidentiality is difficult, the timing of the information should be chosen wisely so it does not jeopardise the investigation.

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South Korea

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While a labour union does not have a legal right under Korean law to be informed or involved in the investigation, unless otherwise required under the relevant collective bargaining agreement, there have been instances where the labour union raised complaints that the company did not properly investigate an employee, who is a member of the labour union, particularly if the company took disciplinary action against that employee based on the findings of the investigation. The company should consider such a practical risk when conducting a workplace investigation.

If the investigation was conducted based on a claim filed by an employee to the Grievance Handling Committee (which is a sub-committee of a works council), the members of that committee have a right to be informed of the results of the investigation.

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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 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?

Belgium

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There are no other mandatory support measures. However, an employer is free to offer additional support, for example, by granting leave from work. If tensions at the workplace are high, it may be a good idea to ask the employee under investigation to take some leave. Some companies also provide certain legal, moral or even psychological support. If the complaint concerns sexual harassment, bullying or violence at work, the prevention adviser can also recommend that the employer take additional measures to support certain employees.

Furthermore, under the whistleblower rules, an external reporting authority can grant any support measure (eg, legal advice or financial, technical, psychological or media-related, social support).

For complaints due to sexual harassment, violence or bullying at work, and if the facts are serious, the prevention adviser should, during the examination of the request and before giving his or her opinion to the employer, propose protective measures to the employer. These measures are necessary to avoid serious damage to the complainant's health or a significant deterioration in the situation (for example, causing opposing parties to commit criminal offences). The final decision on taking these measures rests with the employer. This means that the employer does not necessarily have to take the measures proposed by the prevention adviser. They may take other measures that provide an equivalent level of protection for the employee.

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South Korea

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There could be some instances where an employee involved in an investigation may be entitled to support from the company. To give an example, there have been some cases where a whistleblower claimed they suffered workplace harassment or their employer took retaliatory action (eg, wrongful transfer) and they sought damages or other relief.

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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]

[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 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?



Belgium

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If the investigation is not protected by confidentiality towards the employer (e.g. the prevention advisor cannot disclose confidential information to the employer), it could result in further measures taken by the employer or lead to a new investigation.

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South Korea

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Sometimes, the company discovers other potential misconduct in addition to the specific allegations that trigger a workplace investigation. No law limits the scope of the company's investigation to the allegations that were initially raised.

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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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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.

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



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This will depend on where the employee raises a grievance and the content of the grievance. If it is against the employer, the investigation can take this into account and continue from there. If the grievance is raised against the authorities, it will depend on the steps taken by the authorities.

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South Korea

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It is not uncommon for an employee under investigation to raise grievances during or after the investigation. Below are some examples of claims an employee may raise:

- that the company reviewed the employee's electronic data without obtaining the requisite consent;
- that witnesses or the company committed defamation in violation of the Criminal Code;
- that the employee was coerced to comply with the investigation in violation of the Criminal Code;
- that the employee was disciplined without just cause; or
- that the employee was harassed by other employees for providing information during the investigation.

The actions the company should take would vary depending on the grievance raised.



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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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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.

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



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If this occurs, there is a risk that any measure resulting from the investigation (eg, a dismissal) can be (wrongly) interpreted as discrimination based on the illness of the employee. However, if the employer can prove that the measure is not related to the illness but solely related to the investigation (which is also not related to the illness), there may be no discrimination. The sickness of the employee may prevent the continuation of the investigation because, for example, it becomes impossible to hear from the employee. In this instance, the investigation can be suspended, postponed or extended until the employee returns. If it is a long-term absence, this could lead to a disproportionate amount of time to complete the investigation. Therefore, the employer should take any necessary steps to invite the ill employee to a hearing anyway (eg, through digital means). If the employee unreasonably refuses (several) of these

invitations, it could be argued that the employee is wilfully boycotting the investigation and therefore forfeits his or her opportunity to be heard.

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The company should review whether the employee under investigation is requesting sick leave under appropriate procedures and for a legitimate reason and may consider ways to persuade the employee to cooperate with the investigation. If the employee applies for sick leave following company policy, the company would need to grant such sick leave and suspend the investigation during the sick leave.

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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).

[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



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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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In legal proceedings, a criminal procedure takes precedence over civil procedures. However, disciplinary internal proceedings (like a workplace investigation) and an investigation by the authorities may run parallel to each other. If the public investigation leads to a court procedure that results in the acquittal of the employee under investigation, it could lead to legal problems if the employer has already imposed sanctions based on the same employee. Therefore, the employer could make the internal investigation dependent on the public investigation, and could take preventive measures while awaiting the outcome.

The public authorities normally have the legal competence to request information that can help them in their investigation. Therefore, they could rightfully ask the employer to share evidence or findings from the internal investigation.

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There is no obligation to stay the workplace investigation while the parallel criminal or regulatory investigation is being conducted. In practice, companies often proceed with, or even accelerate, the workplace investigation to find out the facts and defend themselves against the parallel criminal or regulatory investigation being conducted. The company should be careful not to engage in activities that may raise suspicions as to whether the company is impeding the government investigation or concealing or destroying evidence.

While the investigation report would typically not be privileged, the company may consider explaining to the authorities that the investigation findings are not conclusive, should the police or regulator request the internal investigation report.

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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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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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It is highly recommended to inform the employee under investigation of the outcome. If disciplinary measures are imposed upon him or her, the legal procedure must be followed and the sanction must be imposed or communicated the day after the employer or his delegate has established the wrongdoing of the employee.

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There is no legal obligation for a company to disclose the outcome of an investigation to the employee who was subject to it. Having said that, if the company wishes to take disciplinary action against the employee based on the outcome of an investigation, it is required to disclose sufficient detail on the employee's wrongdoing that is subject to disciplinary action. This information should be provided to the employee before the disciplinary action committee (DAC) hearing to provide the employee with sufficient time to

present and defend his or her position during the DAC hearing.

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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]

^[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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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 is recommended to limit the communication to the findings and details of the report that are necessary for the employee to fully understand the outcome. This is especially true if the investigation is bound by a duty of confidentiality (eg, under the whistleblowing rules), as the employee should not be allowed access to the full report.

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As discussed in question 22, when taking disciplinary action against an employee based on the outcome of an investigation, the company would need to disclose sufficient detail on the employee's wrongdoing. However, this does not mean that the full investigation report would need to be shared with the employee to be disciplined. Key details of the investigation findings that apply to the relevant employee due to be disciplined should be shared, and not other findings concerning other persons.

There is also no requirement under Korean law for a company to disclose the investigation report or investigation findings to the whistleblower. If the company discloses the personal identity of the target employees, such disclosure could constitute a violation of the PIPA, libel or defamation under the Criminal Code. If the whistleblower strongly requests that the company share the investigation report or the findings, the company may consider providing a summary of the key findings concerning the allegations that the whistleblower raised, without disclosing personal information.

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

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

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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?

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If the investigation leads to the establishment of grave errors by the employee, this can lead to sanctions. The employer must follow the procedure laid down in the internal work rules of the company and can only impose sanctions that are included in the internal work rules. In general, these are: a verbal warning; a written warning; a suspension (remunerated or not); a fine (capped to one-fifth of daily remuneration); and dismissal. If there are very serious errors leading to an immediate inability to continue the employment relationship with the employee, the employer can dismiss the employee with urgent cause without any notice period or indemnity in lieu of notice (following the specific procedure for these types of dismissals). In less serious cases, the employer could still dismiss the employee with a notice period or indemnity in lieu of notice. In principle, the employer has a right to dismiss the employee, even if this sanction is not included in the internal work rules.

As said previously, disciplinary sanctions (included in the internal work rules) must be communicated to the sanctioned employee the day after the employer or his delegate has established fault. The sanction must be registered in a sanction register, with the name of the employee, the date, the reason and the nature of the sanction. If there is a fine, the amount of the fine should be mentioned. The proceeds of the fines must be used for the benefit of employees. Where a works council exists, the use of the proceeds of the fines must be determined after consultation with it.

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After completing an investigation, the company may consider the following measures, among others:

1. taking disciplinary action against the relevant employees;
2. taking legal action (eg, criminal action, civil action) against the relevant employees; and
3. taking appropriate remedial measures (eg, strengthening existing policies and establishing new policies, and conducting training).

The company may also consider making a voluntary report to the relevant authorities as discussed in

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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.

^[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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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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If the investigated acts constitute a crime, the authorities or the police should be informed. In certain cases, not doing so could lead to the company being accused of concealing a crime or becoming jointly responsible for it. However, if the company is the only victim of the crime and it is minor, the company may choose not to inform the authorities. For example, there is an enormous difference between a bank

employee stealing large amounts of money from clients and an employee who is stealing toilet paper from the company. As stated above, the interview records could be at risk of disclosure if the authorities or police seize them for their investigation.

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There is generally no obligation to report violations to the Korean authorities, subject to limited exceptions (eg, financial institutions are required to report certain types of wrongdoing to the financial regulator; if there was a leak of an industrial technology developed through a national research and development project or a national core technology, this leak should be reported to the Ministry of Trade, Industry and Energy and the National Intelligence Service). However, even in the absence of a self-reporting obligation, the company may consider strategically deciding to make a voluntary report. For example, there have been instances where the police or prosecutors' investigations were conducted in a more limited manner where the company filed a voluntary report and cooperated with the investigation. Also, for certain types of violations (eg, cartel activities), self-reporting to the relevant authority may entitle the company to leniency provided under the law.

In certain instances, the company may also consider reporting violations to the relevant foreign authorities, in addition to, or instead of, the Korean authorities. For example, if the company found potential violations of US law such as sanctions law or the Foreign Corrupt Practice Act, the company may want to self-report these violations to the relevant authorities such as the Office of Foreign Assets Control, or the US Department of Justice.

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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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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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According to the GDPR, personal data should only be stored for a proportionate amount of time. Usually, this means that it can be stored as long as it is relevant for the employment contract, and even afterwards, if there is a risk of legal proceedings (ie, regarding the dismissal of the employee).

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There is no legal requirement on how long the records of the investigation (eg disciplinary action) should be maintained by the company. Many companies maintain a record of disciplinary action throughout the employment period.

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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]

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

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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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In general, abusive investigations could lead to a legal claim regarding the abuse of rights. During an investigation, an employer should be guided by principles of due diligence and not take disproportionate action. If the investigation causes unnecessary damage, involved employees could file for compensation (eg, before the labour court). Next, the employer is also responsible for following the mandatory procedure for official complaints regarding sexual harassment, bullying and violence at work and investigations of whistleblower reports. In the first case, an employer who does not follow the procedure or obstructs the procedure can be liable for penal or administrative fines (maximum 8,000 euro) or, if the employer has not taken necessary measures to mitigate the risks for the employee and the employee suffers damage to their health, they may be liable for a fine of a maximum of 48,000 euro and imprisonment for between six months and three years. In the second case (whistleblower procedure), if an employer did not follow or has obstructed the procedure, they can be fined up to 5% of the annual revenue of the preceding year.

If the complaints involve allegations of sexual harassment, violence or bullying at work, the employer might risk an investigation of the inspection on supervision and well-being at work. If the prevention advisor finds out, before giving his advice, that the employer did not take any suitable protective measures after they were recommended, the prevention advisor is obliged to call an inspection on supervision and well-being at

work.

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As mentioned in question 19, employees may potentially raise claims, such as that the company violated data privacy laws in reviewing employee data, committed defamation, coerced the employee to comply with the investigation, and that witnesses or the company committed defamation in violation of the Criminal Code or disciplined the employee without just cause.

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

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

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual's interest in not using the evidence and in establishing the truth.^[2] The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.^[3] Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to criminal proceedings, to examine whether the evidence could also have been obtained by legal means.^[4]

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

^[1] Cf. ATF 139 II 7.

^[2] ATF 140 III 6 E. 3

^[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), *Zivilprozessrecht*, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[4] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

[6] Jérôme Benedict/Jean Treccani, CR-CPP Art. 140 N. 5 and Art. 141 N. 3.

[7] Yvan Jeanneret/André Kuhn, Précis de procédure pénale, 2nd Edition, Berne 2018, N 9011.

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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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