

# Workplace Investigations

## Contributing Editors

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

### 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.

Last updated on 15/09/2022

### Turkey

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There is no specific legislation governing workplace investigations in Turkish law. However, there are general principles stemming from Labour Law No. 4857 as well as good practice principles. Data protection laws also occasionally intertwine with these. The internal codes and policies of the company should also be followed throughout the process.

Last updated on 15/09/2022

### 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.

Last updated on 15/09/2022

## 02. How is a workplace investigation usually commenced?



### 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).<sup>[1]</sup> 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.<sup>[2]</sup>

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

<sup>[2]</sup> Klaus Moosmayer, *Compliance, Praxisleitfaden für Unternehmen*, 2. A. München 2015, N 314.

Last updated on 15/09/2022



### Turkey

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The need to initiate an internal investigation may arise from the receipt of information from various sources. Reporting is one of the most common sources and can be in different forms. In Turkey, while conventional methods such as reporting to a direct supervisor, human resources or executives is quite common, whistleblowers also use reporting mechanisms such as web-based forms, telephone hotlines or e-

mail, if such mechanisms exist. It is critical to obtain as much information as possible from the complainants at this initial contact, to make a sound decision on whether or not to commence an investigation. There is no requirement to decide to start an investigation and it can be commenced through a corporate resolution (eg, ethics committee resolution or board resolution) of a decision-making body or a decision of the body or person who has such authority under the company policies. The investigation team who will conduct the process may also be approved by the company's decision-making body. It is also advisable to have a preliminary inquiry for the complaints, before commencing a fully-fledged investigation.

Last updated on 15/09/2022



## 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.

Last updated on 15/09/2022

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



## Switzerland

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It is possible to suspend an employee during a workplace investigation.<sup>[1]</sup> While there are no limits on duration, the employee will remain entitled to full pay during this time.

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

Last updated on 15/09/2022

## Turkey

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An employee can be suspended during a workplace investigation provided his or her prior written consent is obtained to this effect during or immediately before the investigation. Obtaining a generic written consent from the employee regarding suspension, which is not tied to a specific event, will not be valid. If there is a suspension of employment due to the workplace investigation, the obligations of the parties arising from the employment relationship continue, except for the employer's obligation to pay a salary (and provide benefits, if any) and the employees' duty to perform work.

There is no provision or established court decision setting forth the rules regarding the length of the suspension period; however, as a general rule, this period should be as brief as possible, so as not to cause any impression that the employment relationship has been terminated by the employer. Suspension of an employee on full pay during a workplace investigation, which is also known as garden leave, is a commonly used alternative to a conventional suspension method described above. During the garden leave period, an employee can be banned from entering the workplace and performing any of his or her duties either partially or entirely while continuing to be paid his or her regular salary, along with fringe benefits. Garden leave is not a concept regulated under Turkish employment legislation, but rather developed in practice, mostly by the Turkish subsidiaries of multinational companies. An ideal approach for the implementation of garden leave would be to obtain the written consent of the employees either at the commencement of employment or during the investigation.

Last updated on 15/09/2022

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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.

Last updated on 15/09/2022

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

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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<sup>[1]</sup>, if the allegations concerned are quite substantive and, in any case, where an increased degree of independence is sought.

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

Last updated on 15/09/2022

## Turkey

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There is no compulsory requirement or qualification arising from the law as to the selection of the investigation team. The number and the profile of the investigation team need to be decided according to the characteristics of the case, whereas the head of the investigation team needs to be a competent and experienced investigator. A conflict of interest review is required to be conducted for the whole investigation team to protect the interests of the company. As conflicts of interest can also arise during an investigation process, relying on the support of an outside legal team should be considered, particularly for internal investigations that are likely to expand.

Last updated on 15/09/2022

## United States

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

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

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

The appropriate investigator should be able to investigate objectively without bias (ie, the investigator cannot have a stake in the outcome, a personal relationship with the involved parties and the outcome of the investigation should not directly affect the investigator's position within the organisation); has skills that include prior investigative knowledge and a working knowledge of employment laws; has strong

interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair; is detail-oriented; has the right temperament to conduct interviews; can be trusted to maintain confidentiality; is respected within the organisation; and can act as a credible witness.

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

Last updated on 15/09/2022

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



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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.

Last updated on 15/09/2022



### Turkey

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There is no specific remedy provided under Turkish law to stop the investigation. One may consider requesting an injunction from a court for this purpose, but it is less likely that such a request would be successful. This is because investigations are often conducted for fact-finding purposes and to obtain an injunction the claimant will need to prove that this fact-finding exercise will pose a great risk and cause irreparable harm to the employee.

Last updated on 15/09/2022



### 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.

Last updated on 15/09/2022

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



### Switzerland

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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.<sup>[1]</sup> 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).<sup>[2]</sup>

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<sup>[1]</sup> 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.

<sup>[2]</sup> 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.

Last updated on 15/09/2022



### Turkey

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Co-workers cannot be compelled to act as witnesses in a workplace investigation. Employees also have rights arising from the law that must be respected by the employers and investigators, such as the right to privacy or to remain silent, freedom of expression and communication. These rights must be protected during every step of the workplace investigation process.



## United States

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

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

Last updated on 15/09/2022

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



## 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.<sup>[1]</sup>

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.<sup>[2]</sup> The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

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

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<sup>[1]</sup> Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in:



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

Last updated on 15/09/2022

## Turkey

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The conditions applicable to gathering physical evidence mainly stem from the precedents of the Turkish Constitutional Court about employment disputes and the rules set forth under Turkish Law No. 6698 on the Protection of Personal Data (DPL). It is generally accepted that employers can gather physical evidence for certain legitimate purposes, such as disciplinary investigations, the prevention of bribery and corruption, fraud or theft, money laundering, and employee performance monitoring and compliance. In doing so, employers must, however, comply with the fundamental principles of the Turkish Constitutional Court as briefly described below:

- The grounds for the gathering of evidence must be legitimate. The definition of the legitimate interests of the employer may change depending on the characteristics of the business, workplace and employee job description, as well as the specific circumstances of the case. Therefore, it is advisable to carry out a balancing test between the legitimate interest the employer is seeking to protect and the employee's interest in the protection of their privacy.
- The collection activities must be proportionate, in the sense that the measure implemented by the employer must be appropriate and reasonably necessary to achieve the legitimate purpose, without infringing upon the fundamental rights and freedoms of the employees. For instance, e-mail monitoring to collect evidence may not be proportionate if it is determined that e-mails that are not related to the incident subject to investigation are also accessed. To achieve this, certain keywords or algorithms can be used while monitoring e-mails during a disciplinary investigation.
- The collection process must be necessary to achieve the purpose. In other words, the collection of physical evidence must only be carried out to the extent there are no other measures allowing the employer to achieve its purpose, such as witness testimony, workplace records, or examining the results of projects. If the purpose can be achieved through less invasive means, the collection of physical evidence may not comply with the principles established by the decisions of the Constitutional Court.

Separately, depending on the type of physical evidence collected, the collection process may lead to the processing of the concerned employees' personal data. Under the DPL, personal data collected in Turkey can only be processed if the explicit consent of the data subject is obtained; or the data is processed based on one of the exceptions to consent provided by the law. To the extent the data processing can be deemed to be based on the pursuit of a legitimate interest of the employer, it should also meet the following conditions:

- it should be the most convenient and efficient method to identify any employee wrongdoing to protect the legitimate interests of the company; and
- the data processing should not harm the fundamental rights and freedoms of the employees.

The employer should in any case comply with the obligation to inform employees before the processing of their data, through a privacy notice containing mandatory information required by the DPL.

In addition, as a general principle, the evidence-gathering process should always be conducted based on the assumption that the internal investigation can lead to litigation. Any evidence that will be used in litigation needs to have been gathered in compliance with the law. In both criminal and civil litigation, the courts will review each piece of evidence to confirm whether it was gathered through lawful methods and disregard any evidence that fails to comply with due process.



## United States

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

Last updated on 15/09/2022

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



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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.<sup>[1]</sup> 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.<sup>[2]</sup>

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[1] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168.

[2] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168 et seq.

Last updated on 15/09/2022



## Turkey

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There is no explicit answer to this question. However, it is important to make a distinction between employees' possessions and files that are strictly personal and employees' possessions and files that are found on devices or files provided for company use. For the first category, the employer does not have the right to search employees' possessions and files. For the latter category though, justifications need to be established, by observing the requirements explained in question 7. Furthermore, the employers must also

ensure that employees are fully and explicitly informed in advance of the monitoring operations, either through a provision included in the employment agreement, or in a separate notice or employee policy, the receipt of which should be duly acknowledged by the employee.

Last updated on 15/09/2022



## United States

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

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

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

Last updated on 15/09/2022

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



## Switzerland

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

Last updated on 15/09/2022

## Turkey

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Although there is no specific legislation in Turkish law on whistleblowing, necessary mechanisms need to be implemented to ensure that whistleblowers and the whistleblowing process are kept confidential. In addition, whistleblowers must be encouraged and supported to be open about raising their concerns in good faith. A whistleblowing activity, when it amounts to raising a concern in good faith, must not be mistreated by the employer. Employers should also put in place protection mechanisms against the mistreatment of whistleblowers or retaliation towards them by other employees.

Last updated on 15/09/2022

## United States

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

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

Last updated on 15/09/2022

# 10. What confidentiality obligations apply during an investigation?

## 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.<sup>[3]</sup>

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

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

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

Last updated on 15/09/2022



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As a general practice, workplace investigations need to be kept confidential for the integrity of the process. In some cases, employees can specifically request their identity or involvement be kept confidential. In such cases, additional measures need to be taken to protect confidentiality. In any case, obligations and rights arising from the DPL and Labour Law must be respected and complied with by the employer and the investigation team.

Last updated on 15/09/2022



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

Last updated on 15/09/2022

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

## 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.<sup>[1]</sup> The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.<sup>[2]</sup>

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.<sup>[3]</sup>

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)).<sup>[4]</sup> Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9 paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

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

<sup>[2]</sup> Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

<sup>[3]</sup> Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

<sup>[4]</sup> Claudia Götz Staehelin, *Unternehmensinterne Untersuchungen*, 2019, p. 37.

Last updated on 15/09/2022

## Turkey

Author: *Elvan Aziz, Gülce Saydam Pehlivan, Emre Kotil, Osman Pepeoğlu*  
at Paksoy

Informing the employee under investigation on the subject, purpose and possible consequences of the investigation need to be evaluated by the investigation team before the interview. As a general principle, the interviewer is expected to share the information he obtained on the case with the employee, and ask for confirmation or clarification on these matters. The employee under investigation may be subject to an interview to gain information or as a confrontation if there is concrete evidence. If the evidence in hand is not based on concrete and material grounds, it would be more appropriate not to lead the interview to a confession, but inform the employee of the possible allegations. However, if the available evidence is based on concrete and material grounds, the interviewer may confront the interviewee by sharing the information that was gathered during the investigation in an attempt to obtain a confession.

Last updated on 15/09/2022



## United States

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

The investigator must disclose to the employee under investigation the purpose of the investigation and, where the investigator is in-house or outside counsel, he or she should disclose that the company is the client.

Last updated on 15/09/2022

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



## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused' interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person implicated by the information provided.<sup>[1]</sup>

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

Last updated on 15/09/2022



## Turkey

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It is possible to keep such information confidential. If this is the case, the investigation team should conduct the interview outside the workplace of the company. This is actually good practice applicable to all internal investigations, unless there is a particular reason that requires the meetings to be held at the company.

Last updated on 15/09/2022



## United States

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

Last updated on 15/09/2022

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



## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
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In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

Last updated on 15/09/2022



## Turkey

Author: *Elvan Aziz, Gülce Saydam Pehlivan, Emre Kotil, Osman Pepeoğlu*



at Paksoy

It is crucial to keep the events and facts of a workplace investigation confidential for the integrity of the process. It may be necessary to consider appropriate confidentiality measures to protect the complainant, mitigate risks, and preserve evidence. Damage to the confidentiality of the case can prevent the investigation team from bringing the case to a correct and complete conclusion. Although the labour legislation imposes a general confidentiality obligation on employees, NDAs can still be used as supplementary documents that may emphasise the confidentiality obligations of employees in workplace investigations and provide additional contractual protections such as penalties if there is a breach.

Last updated on 15/09/2022



## 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.

Last updated on 15/09/2022

## 14. When does privilege attach to investigation materials?



## 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).<sup>[1]</sup>

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

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

## Turkey

Author: *Elvan Aziz, Gülce Saydam Pehlivan, Emre Kotil, Osman Pepeoğlu*  
at Paksoy

Attorney-client privilege is attached at the time the attorney is hired as a legal representative. Attorney-client privilege, which is regulated under the Law of Criminal Procedure No. 5271 and the Attorney's Act No. 1136, covers not only the investigation process, but also the legal advice and counselling received before and after the investigation. The importance of this privilege is especially present in cases where judicial or administrative authorities are involved in the process. Documents and correspondence benefiting from attorney-client privilege can be protected and fall outside the scope of preventive measures such as search and seizures due to the right of defence.

Last updated on 15/09/2022

## United States

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

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

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

Last updated on 15/09/2022

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

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
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In the case of an employee involved in an internal investigation, a distinction must be made as to whether the employee is acting purely as an informant or whether there are conflicting interests between the company and the employee involved. If the employee is acting purely as an informant, the employee has, in principle, no right to be accompanied by their own legal representative.<sup>[1]</sup>

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.<sup>[2]</sup> 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.<sup>[3]</sup>

In general, it is advisable to allow the involvement of a legal representative to increase the willingness of the employee involved to cooperate.

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<sup>[1]</sup> Claudia Götz Staehelin, *Unternehmensinterne Untersuchungen*, 2019, p. 37.

<sup>[2]</sup> Simona Wantz/Sara Licci, *Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen*, in: Jusletter 18 February 2019, N 59.

<sup>[3]</sup> Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 392; Niklaus Ruckstuhl, BSK-StPO, Art. 158 StPO N 36.

Last updated on 15/09/2022

## Turkey

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Yes, the employee under investigation has a right to be accompanied by his or her legal representative during the investigation. It is also essential that the employee under investigation is informed about his or her right to have a legal representative.

Last updated on 15/09/2022

## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*  
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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.

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



### Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
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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.

Last updated on 15/09/2022



### Turkey

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An authorized trade union, if any, may have the right to be informed or involved in the investigation, depending on the terms of the collective bargaining agreement in place. Even in the absence of such a provision in the collective bargaining agreement, it would still be recommended to inform the trade union of the investigation as a courtesy. We do not have works councils under Turkish employment law.

Last updated on 15/09/2022



### United States

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

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

Last updated on 15/09/2022

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



### 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.<sup>[1]</sup> 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.<sup>[2]</sup>

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

<sup>[2]</sup> David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern, 2021, p. 133.

Last updated on 15/09/2022



## Turkey

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The employees involved in the investigation should be granted their personal needs (such as refreshments or access to the bathroom), as well as translation services or transportation, if needed. A breach of these rights or needs during the process may constitute a violation of the law and adversely affect the validity of the results to be obtained from the investigation.

Last updated on 15/09/2022



## United States

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

Last updated on 15/09/2022

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



Switzerland

## 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.

Last updated on 15/09/2022

## Turkey

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at Paksoy

If an unrelated matter is revealed during the investigation, an independent assessment needs to be made as to whether this new matter requires to be included in the same internal investigation, or a separate/new one should be commenced.

Last updated on 15/09/2022

## United States

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

Last updated on 15/09/2022

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

## Switzerland

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In the context of private internal investigations, grievances initially raised by the employee do not usually have an impact on the investigation.

However, if the employer terminates the employment contract due to a justified legal complaint raised by an employee, a court might consider the termination to be abusive and award the employee compensation in an amount to be determined by the court but not exceeding six months' pay for the employee (article 336 paragraph 1 (lit. b) and article 337c paragraph 3, Swiss Code of Obligations). Furthermore, a

termination by the employer may be challenged if it takes place without good cause following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee (article 10, Federal Act on Gender Equality).

Last updated on 15/09/2022



## Turkey

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If, during the investigation, the employee under investigation raises a grievance, the investigator will be expected to temporarily stop the investigation to assess the situation. The investigation team will evaluate whether the employee is raising a grievance as a defence mechanism or in good faith and with sincere concerns. If the subject of the grievance is related to the pending investigation, the investigation may be extended to cover this new item. Otherwise, a new investigation can be initiated by the investigation team.

Last updated on 15/09/2022



## United States

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

Last updated on 15/09/2022

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



## Switzerland

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The time spent on the internal investigation by the employee should be counted as working time<sup>[1]</sup>. 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).

Last updated on 15/09/2022

## Turkey

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The employee's participation in the investigation is vital for a fair assessment and to ensure that the employee has been allowed to defend himself or herself against the allegations. As such, every reasonable effort must be made by the employer to adjust the investigation process so that the employee can take part in the investigation. For example, if the employee goes off sick and thus cannot attend the investigation interviews or disciplinary hearings, the investigation should be carried out as much as possible without resorting to the employee in question, by initially exhausting the other available options (such as conducting interviews or disciplinary hearings with other available witnesses). However, if the employee's absence takes longer than is reasonably expected or the matter at hand must be dealt with urgently, the employer may consider concluding the investigation and determining the next steps based on the information at hand. In such a case, it is recommended to explain in the investigation report the reasons why the employee could not take part in the investigation process (ie, why an interview or disciplinary hearing, etc, could not have been arranged with the employee) along with supporting documentation evidencing the employer's efforts to involve the employee in the investigation process and the employee's excuse for not participating interviews or disciplinary hearings.

Last updated on 15/09/2022

## United States

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

Last updated on 15/09/2022

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

## Switzerland



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The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

Last updated on 15/09/2022

## Turkey

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If the issues being examined during an investigation are also subject to parallel criminal or regulatory investigation, the workplace investigation will probably be stayed. This is primarily because parallel criminal or regulatory investigations would necessitate a more comprehensive examination and public bodies overseeing such investigations have a broader legal prerogative to gather evidence. It is, therefore, advisable to stay the internal investigation to not interfere with the criminal or regulatory authorities. If a prosecutor or a court requires the employer to give evidence or share certain documents, the police can compel the employer to share evidence. Regulatory bodies may also ask the employer to share evidence and the powers conferred on such regulatory bodies will be a determining factor in whether they can compel the employer.

Last updated on 15/09/2022

## United States

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Employers have obligations to conduct a thorough and unbiased internal investigation and take prompt remedial action to prevent further workplace violations. As such, absent a criminal or regulatory investigation where the investigators ask the employer to pause an internal investigation, employers should be prepared to continue their internal investigation in parallel with the criminal or regulatory investigation while cooperating with police or regulatory investigators.

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

Last updated on 15/09/2022

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

## Switzerland

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Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.<sup>[1]</sup> 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.<sup>[2]</sup>

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<sup>[1]</sup> Arbeitsgericht Zürich, Entscheide 2013 No. 16; Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 393 et seq.

<sup>[2]</sup> Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 394.

Last updated on 15/09/2022

## Turkey

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In general, the employee under investigation should be adequately informed about the allegations and findings to be able to defend him or herself. If no legal action will be taken against the employee under investigation as a result of the investigation, the employee may be notified regarding the findings and the outcome of the investigation. If the employee will be subject to a legal or administrative action (ie, warning, reprimand, or termination of employment), the formal requirements stemming from the Labour Law will need to be followed.

Last updated on 15/09/2022

## United States

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

Where the misconduct alleged poses a high risk to the company from a reputational, operational or legal perspective, and especially where an investigation is conducted by outside counsel, outside counsel should determine, in consultation with the relevant individuals at the company, for example the general counsel,

how and with whom to share investigation results and if and how to communicate the outcome to the complainant and the subject of the complaint. This is the case regardless of whether the allegations are found to be substantiated or unsubstantiated.

Last updated on 15/09/2022

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



### Switzerland

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In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).<sup>[1]</sup> 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.<sup>[2]</sup>

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

Last updated on 15/09/2022



### Turkey

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There is no legal requirement for the disclosure of the investigation report in full. If the investigation report needs to be submitted to the court, public institutions or other third parties, measures may need to be taken to protect confidentiality or to comply with the confidentiality requests of the persons participating in the investigation.

Last updated on 15/09/2022



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

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



### Switzerland

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If the investigation uncovers misconduct, the question arises as to what steps should be taken. Of course, the severity of the misconduct and the damage caused play a significant role. Furthermore, it must be noted that the cooperation of the employee concerned may be of decisive importance for the outcome of the investigation. The possibilities are numerous, ranging, for example, from preventive measures to criminal complaints.<sup>[1]</sup>

If individual disciplinary actions are necessary, these may range from warnings to ordinary or immediate termination of employment.

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

Last updated on 15/09/2022



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The employer may take various legal remedies against the employee whose infringement is discovered as a result of the internal investigation. Depending on the outcome of the investigation, the employer:

- may provide the employee with a written warning requesting him or her not to repeat the same conduct;
- terminate the employment relationship based on either just cause, without paying any compensation immediately, or valid reason by observing statutory notice periods or making payment in lieu of notice and paying severance compensation if applicable; or
- not take any action if the investigation concludes that no fault is attributable to the employee.

Last updated on 15/09/2022



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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.

## 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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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.<sup>[1]</sup> If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.<sup>[2]</sup>

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<sup>[1]</sup> Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 123.

<sup>[2]</sup> 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.

Last updated on 15/09/2022



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Investigation reports may be disclosed in potential lawsuits or judicial proceedings. Therefore, the investigation report must demonstrate that a detailed and objective investigation has been carried out. Courts may also request that the interview records be disclosed to them, failing which, the courts may resort to an adverse inference in civil proceedings. Criminal courts can also ask the interview records to be disclosed if this would be necessary for reaching the truth. Failure to disclose may entail criminal responsibility under certain conditions.

Last updated on 15/09/2022



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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.

Last updated on 15/09/2022

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



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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).<sup>[1]</sup>

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

Last updated on 15/09/2022



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There is no provision in the legislation setting forth a specific duration for keeping the outcome of the investigation findings in personnel files. However, based on general principles, the outcome of the investigation can remain on the employee's personnel files as long as the employer has a lawful interest in such processing without unnecessarily harming the privacy rights of the employee.

Last updated on 15/09/2022



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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.

Last updated on 15/09/2022

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



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

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

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

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

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[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht,

Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

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

[5] Decision of the Swiss Federal Court 6B\_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B\_22/2012 dated 11 May 2012 consid. 2.4.4.

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

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

Last updated on 15/09/2022



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The nature of legal exposure is very much dependent on the legal action the employer has taken after the investigation. The employer may be subject to a wrongful termination lawsuit to be filed by the employee, which may result in the payment of compensation to the employee of between eight and 12 months' salary, if the court concludes that the termination is wrongful. This may also include monetary and moral damages claims. If no termination has taken place, the employee may terminate his or her employment with just cause if the employer has erred in its neutral fact-finding mission and this affects the employee. The employee may also file a criminal complaint to the extent that the investigation findings incriminate the employee in error.

Last updated on 15/09/2022



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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.

Last updated on 15/09/2022





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