

Workplace Investigations

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

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No specific rules directly govern a workplace investigation in the event of employee misconduct. However, several rules, both legal and administrative, affect the conduct of such an investigation. In addition, codes of conduct, internal regulations or guidelines may also exist within companies.

A new law (No. 2022-401) came into effect on 1 September 2022 and constitutes one of the cornerstones for future regulation of workplace investigations. This law transposes into French law the European directive relating to whistleblower protection. It does not, however, constitute a revolution, as a previous French law dated 9 December 2016 (the so-called Sapin 2 Law) already provided the whistleblower with a specific status and protection. These laws are fundamental when considering an internal investigation as the rules protecting the whistleblower and requiring the establishment of an internal whistleblowing channel (eg, a dedicated email or hotline) affect the degree of flexibility available to companies in conducting the investigation.

A new decree has been adopted (No. 2022-1284), dated 3 October 2022, for application of these new provisions. This decree sets out several obligations relating to the internal whistleblowing reporting process. The reporting channel will necessarily contribute to shape the internal investigation triggered by situations which have been reported by that channel. Companies subject to this decree may define the reporting procedure using the supporting tool of their choice (company collective agreement, internal memorandum, etc.), as long as the employee representative bodies are duly consulted on the matter. The decree also specifies that an acknowledgement of receipt of the alert must be provided to the author of the alert in writing within seven days from the company receiving the alert. The author of the alert must also be informed in writing, within a reasonable period not exceeding three months from acknowledgement of receipt of the alert, of the measures envisaged or taken to assess the accuracy of the allegations and, where appropriate, to remedy the situation which had been reported, as well as the reasons for these measures and, finally, the closure of the case.

More generally, not only do all the “pure” labour law rules relating to the protection of the human rights of employees need to be complied with (right to privacy, data protection under the GDPR, etc), but also the disciplinary rules and regulations that protect employees from unfounded sanctions imposed by their employer. For example, an employer can only sanction an employee's misconduct if the disciplinary procedure begins within two months of when the misconduct was committed or when the employer

becomes aware of it. In this respect, an internal investigation can be necessary for the employer to obtain full knowledge of the facts alleged to have been committed by the employee. It is nonetheless recommended that the internal investigation be completed within these two months to avoid the risk of the disciplinary action being time-barred.

Administrative rules produced by the French anti-corruption agency should also be taken into consideration (good practice, guidelines and recommendations relating to senior management's commitment to implement anti-corruption measures, corruption risk mapping, corruption risk management measures and procedures), as well as the guidelines produced by the French Ministry of Employment relating to the prevention of sexual harassment and gender-based violence or the recommendations of the Human Rights Defender, which is a French special institution aimed at protecting fundamental rights.

When the investigation in question concerns moral or sexual harassment or violence in the workplace, the national interprofessional agreement of 26 March 2010 should be referred to. This text stipulates that in the event of an investigation procedure, it should be based on, but not limited to, the following guiding principles:

- it is in everyone's interest to act with the discretion necessary to protect everyone's dignity and privacy;
- no information, unless it is anonymized, should be divulged to parties not involved in the case in question;
- complaints must be investigated and dealt with without delay;
- all parties involved must be listened to impartially and treated fairly;
- complaints must be supported by detailed information;
- deliberate false accusations must not be tolerated, and may result in disciplinary action;
- external assistance may be useful, notably from occupational health services.

Many are calling for the adoption of legislative rules governing such investigations, and their coordination with general whistleblower protection measures.

Finally, a company must take its own rules and regulations into account. Every company with at least 50 employees has the legal obligation to draw up internal rules and regulations, which notably set out the disciplinary sanctions applicable to employees, as well as a reminder of certain employees' rights.

Last updated on 27/11/2023



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Dutch employment law does not provide for a timeframe within which an internal investigation must be launched. However, it is important for an employer who suspects abuse or irregularities, to start an internal investigation without delay. In essence, that means that as soon as management, or – depending on the specific circumstances – the person who is authorised to decide on disciplinary sanctions against a certain employee, becomes aware of a potential abuse or irregularity, all measures to initiate an internal investigation should be taken promptly. If this is not done, the employer may lose the opportunity to take certain disciplinary actions.

The legal framework relating to an investigation by an employer into the acts and omissions of an employee are determined by, among other things, section 7:611 of the Dutch Civil Code (DCC) that stipulates good employer practices; Section 7:660 DCC (right to give instructions to the employee); the European Convention on Human Rights; the Dutch Constitution; the General Data Processing Regulation; and, if the employer uses a private investigation agency, the Private Security Organisations and Detective Agencies Act and the Privacy Code of Conduct for Private Investigation Agencies.

The legal basis from which the employer derives the authority to investigate can be based on the employer's right to give instructions (section 7:660 DCC). Pursuant to this section, the employer has – to a

certain extent – the right to give instructions to the employee “which are intended to promote good order in the undertaking of the employer”. In many cases, an investigation of a work-related incident will aim to promote good order within the company. As such, the investigation is trying to:

- find the truth;
- sanction the perpetrator; and
- prevent repetition.

Instructing an employee to cooperate with an internal investigation falls within the scope of the right to instruct.

Subsequently, the employer must behave as a good employer during the investigation, pursuant to section 7:611 DCC. This is coloured by the classic principles of careful investigation: the principle of justification, the principle of trust, the principle of proportionality, the principle of subsidiarity and the principle of equality. Furthermore, the principle of hearing both sides of the argument applies and there must be a concrete suspicion of wrongdoing.

Last updated on 27/11/2023

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

02. How is a workplace investigation usually commenced?

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When a report of wrongdoing is brought to the employer's attention, whether through a whistleblower or another channel, and an internal investigation is expected, it may be either mandatory or optional, depending on the facts of the alleged wrongdoing.

The investigation will be mandatory when the alleged wrongdoing relates to an ethical issue according to anti-corruption regulations, the employer's duty of due diligence regarding, for example, human rights or environmental matters, or where the works council has issued an alert relating to a “serious and imminent danger” (or to “fundamental human rights”), but also whenever it relates to the employer's obligation to ensure employee safety (eg, moral or sexual harassment).

If the investigation is not mandatory, it is up to the employer to decide whether or not to carry out the investigation. Several key questions can help the employer determine whether or not it is appropriate to carry out an investigation, such as:

- What are the benefits of doing nothing? The company will have to draw up a list of the pros and cons of an investigation, bearing in mind that in some cases a poorly conducted investigation could make the situation worse;
- What is the priority (eg, obtaining or securing evidence, or correcting the irregularity)?
- What rules or codes of ethics must the company comply with?
- Should external legal counsel only advise the company or should they play a major role in the investigation process by becoming an investigator?

Last updated on 27/11/2023



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The workplace investigation can be exercised by an internal (ad hoc) investigation department of the company itself, for example under the direction of the internal audit department or compliance department. This is possible if there is sufficient manpower with the necessary independence, knowledge and experience. Case law, however, shows that courts tend to be more critical of internal investigations than external investigations. For more complex and sensitive investigations, a forensic accountant or lawyer is often involved. The advantage of involving a lawyer is that the investigation and its outcome are covered by privilege. This guarantees the confidentiality of the investigation, also regarding supervisors and investigating authorities. Yet, at the same time, there is increasing debate about the role of lawyers as investigators, given their inherent bias to work in the interests of their client (the employer).

The investigation starts with a plan of approach that must be signed by the contractor. This plan of approach outlines the legal framework of the investigation, such as the scope, the means to be used, how it will deal with data, the use of experts, how the interviews will be conducted, the way of reporting and confidentiality. Furthermore, there must be a protocol for how the investigator conducts the investigation and that applies to all parties involved.

Gathering information can be done in various ways. For example:

- An inventory can be made of the household effects of a company. In the event of theft, an inventory can be an appropriate means of establishing exactly what has been stolen.
- An investigation of the books: this is an investigation of all documents of the company. These are not private documents of employees, but documents of the company itself. For an investigator, an interview can be a good way to gather more information, for example by interviewing witnesses. In practice, there are almost always several interviews with the suspects, the employer and other people involved.
- Open source research, which often involves researching a person's social media, or public documents relevant to the research. In principle, "open sources" refers to all public documents in the world; nowadays, many public documents are digitised.
- A workplace search, which includes everything present in the workplace: diaries, computer files, e-mails, letters, and even the contents of a wastebasket.
- A digital data investigation: this is a frequently used tool in fraud investigations. Most communication and documents are digital nowadays. It is, therefore, very likely that evidence can be found in digital data. Each of these means of investigation must respect the principles of an internal investigation and comply with the GDPR principles .

Last updated on 27/11/2023



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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.

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)?



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An employee may be suspended or relocated during a workplace investigation by:

- suspending the employee as a precautionary measure (eg, pending a confirmation of dismissal);
- temporarily assigning the employee to another site; or
- exempting the employee from having to work while continuing to pay them their salary.

The employee can be suspended as a precautionary measure, pending confirmation of dismissal, but this implies that disciplinary proceedings have already begun and that the investigation is therefore at a relatively advanced stage and that there is sufficient evidence to suggest the need for disciplinary action. It should be made clear to the employee that the suspension is a provisional measure (in the absence of specifying this, the suspension could be interpreted as a disciplinary layoff constituting a sanction and, in some jurisdictions, as depriving the employer of the possibility of dismissing the employee for the same facts).

Temporary reassignment can also be considered. However, this contractual change must not apply for long and the measure taken must be temporary. The employer must act promptly – the measure is only valid for as long as the investigation continues. Failing this, and because of the absence of concurrent disciplinary proceedings, there is considerable risk that the temporary reassignment may be reclassified by a judge as an illegal modification of the employment contract or as a disciplinary sanction preventing the employee from subsequently being dismissed.

Finally, paid exemption from work is also possible and consists of temporarily suspending, by mutual agreement, the obligation of the employer to provide work for the employee and the employee's obligation to work, without affecting their remuneration. Such a measure must generally be taken with the consent of

the employee, because it implies a suspension (and therefore a modification) of the employment contract. This measure may be useful in temporarily removing an employee with whom the employer maintains a good relationship. This may be an employee who is or feels they are a victim of harassment, especially when the employee is not on sick leave.

Last updated on 15/09/2022



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Suspension is usually a disciplinary measure. The employer may, for example, suspend an employee if it is necessary that the employee doesn't work during the investigation into their actions or omissions. Suspension has no specific legal basis in Dutch law, but several conditions can be derived from case law or collective labour agreements.

Overriding interest

The measure may only be taken if the employee's presence at work would cause considerable harm to the employer's business or if, due to other compelling reasons that do not outweigh the employee's interests, the employer cannot reasonably be expected to tolerate the employee's continued presence at work. If there is a well-founded fear that the employee will (among other things) frustrate the investigation into their actions, the employer may proceed to suspend the employee.

Procedural rules

The principle of acting in line with good employment practice (section 7:611 DCC) plays an essential role in the question of the admissibility of the suspension. The principle of due care leads, among other things, to a duty of investigation for the employer and means the employer must enable the employee to respond adequately to any accusations.

Contractual arrangements

Many collective agreements or staff handbooks contain regulations on suspension and deactivation. The regulation may concern the grounds, the duration or the procedure to be followed. The latter includes rules on hearing both sides of the argument, the right to assistance, how the decision must be communicated to the person concerned, and the possibility of "internal appeal" and rehabilitation. Under good employment practice, the employer must proceed swiftly with the investigation and allow the employee to respond to the results. If the employee hinders the investigation in any way, it can be a reason to continue the suspension during the investigation.

Pay

In 2003, the Supreme Court ruled that suspension is a cause for non-performance of work that must reasonably be borne by the employer according to section 7:628 DCC. The employee has a right to be paid in nearly all circumstances, with limited exceptions (eg, if the employee is in detention and the employer suspended the employee in response to that).

Duration

The duration of the suspension during a workplace investigation is not legally pre-determined. However, the suspension of an employee must be a temporary measure. The relevant collective agreement often stipulates how long the suspension may last.

Last updated on 27/11/2023



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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.

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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In determining who is to conduct a workplace investigation, the main objective is to ensure that the team is independent or at least that it is perceived as being independent. The key people in the investigation team can be identified in a pre-established procedure. It is good practice to give decision-makers the possibility to set up, on a case-by-case basis, the team most appropriate to the situation.

Last updated on 15/09/2022

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Workplace investigations, if they are to be of value, must be conducted by an expert, professional and independent party. To safeguard the independence of the investigation, it is crucial that neither the contractor nor any other third party can influence how the investigation is to be conducted or how the outcome should be reported. The investigation must be conducted according to the protocol drawn up at the start and the investigator must not be involved in the follow-up to the outcome.

There is an ongoing discussion of whether lawyers can conduct an objective and independent investigation, due to the bias inherent to their profession. On the other hand, investigation bureaus or committees are also not necessarily independent, as they are not regulated and not subject to disciplinary law.

Last updated on 27/11/2023

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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.

Last updated on 15/09/2022

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



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An internal investigation is not a police enquiry or a judicial instruction; there is no legal provision enabling an employee to stop the investigation. At the same time, there is no legal provision enabling the employer to force an employee to be interviewed. Interviewing an employee within the context of an internal investigation is also not a disciplinary matter. Therefore, the employee has no right to be assisted by another employee or an employee representative. The employee could, however, lawfully request the presence of their lawyer, especially if the company's lawyer is part of the investigation team.

Last updated on 15/09/2022



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Usually there is some kind of regulation in place as a result of which the employee is obliged to cooperate with the investigation. Nonetheless, there are examples whereby the employee refuses to cooperate. Especially in workplace investigations it will be hard to be able to conduct an investigation in such a situation.

There are, however, no possibilities for an employee to bring legal action in order or with the result to stop the investigation.

Last updated on 27/11/2023



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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

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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Co-workers can spontaneously act as witnesses and provide statements to superiors before, during or after the interviews. Co-workers can also be interviewed as witnesses at the investigator's request, although they are not under any obligation to answer the questions and they cannot be compelled to do so. The investigators have an absolute obligation of discretion during the investigation and cannot reveal any details of the information gathered.

Certain employees may benefit from whistleblower status, which implies that they may be exempt from potential criminal and civil liability relating to their report or testimony and they are protected from any retaliatory measures from the employer. "Facilitators" who helped the whistleblower and the individuals connected with the whistleblower and risk retaliatory measures by testifying as a witness may also benefit from this status, as of 1 September 2022.

Last updated on 15/09/2022



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There is no statutory regime for employee witnesses in internal (workplace) investigations and, hence, no specific statutory regime for legal protection. However, as part of the idea that employees have to act in line with good employment practices (section 7:611 DCC), employees, who potentially acquired knowledge in a work-related context on the subject matter of an investigation, are typically required vis-à-vis their employer to participate in such internal investigations. The required degree of cooperation will depend on the type and nature of the investigation and the matter that is being investigated. The principle of "good employment practices" in turn requires the employer to be guided by proportionality and subsidiarity considerations: which information is relevant to the investigation and what is the least burdensome means of collecting such information?

This may also impact the degree to which an employer can involve employee witnesses in an investigation. Increased prudence should be observed, among other things, if the relevant employee witnesses may themselves become implicated in the investigation or when the employer envisages sharing certain investigative findings with regulatory or criminal authorities, for instance as part of cooperation arrangements in an ongoing investigation. In such cases, the relevant employee should at least be allowed to retain legal counsel before continuing interview procedures.

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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.

Last updated on 15/09/2022

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

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GDPR principles fully apply to data gathering, as well as case law protecting the right to respect one's private life and the secret of correspondence.

Last updated on 15/09/2022

Netherlands

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Dutch data protection rules are based on the EU Data Protection Directive. The employer has to notify the Dutch Data Protection Authority when processing personal data as part of an internal investigation. Given

that the notification can be accessed publicly, it is recommended that the employer give a sufficiently high-level description of the case. In addition, the description should be sufficiently broad to include the entire investigation, and any future expansions of the scope of the investigation. Often companies make filings for all future internal investigations, without referring to specific matters.

The employer has to notify employees whose personal data is being processed about – among other things – the purposes of the investigation and any other relevant information. According to the Dutch Data Protection Act, this information obligation may only be suspended on restricted grounds, i.e. if the purpose of the investigation is the prevention, detection and prosecution of crimes and postponement is necessary for the interests of the investigation (e.g., because there is a risk of losing evidence, or collusion by individuals coordinating responses before being interviewed)). These exceptions on the duty to inform involved persons must be interpreted very restrictively. As soon as the reason for postponement is no longer applicable (e.g., because the evidence has been secured), the individuals need to be informed.

Dutch data protection law does not require the consent of employees. Consent given by employees, however, also cannot compensate for a lack of legitimate purpose or unnecessary or disproportionate data processing, as the consent given by an employee to its employer is not considered to be voluntary given the inequality of power between them.

Furthermore, internal company policies may contain specific data protection rules.

Last updated on 27/11/2023



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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.

Last updated on 15/09/2022

08. Can the employer search employees' possessions

or files as part of an investigation?



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In internal investigations, the fundamental rights and freedoms of employees are at stake, including the right to privacy, respect for the privacy of home life and correspondence, freedom of expression, and the obligation of loyalty in searching for evidence.

In principle, work emails and files can be reviewed, even without the employee's consent, prior knowledge or warning. This includes: work email accounts; files stored on a work computer or a USB key connected to a work computer; and SMS messages and files stored on a work mobile phone and documents stored in the workplace unless they are labelled as “personal”. On the other hand, it is not permissible for an employer (or an investigator) to review “personal” emails and files, such as documents or emails identified as “personal” by the employee, or personal email accounts (Gmail, Yahoo, etc), even if accessed from a work computer.

There are certain exceptions to the above principle. An employer is allowed to check “personal” emails or data in any of the following cases:

- if the employee is present during the review;
- if the employee is absent, but was duly notified and invited to be present;
- if there is a particularly serious “specific risk or event”;
- if the review is authorised by a judge (this means having to prove a legitimate reason justifying not informing the employee).

When documents or emails are not marked as “personal” but contain information of a personal nature, the employer may open and review the data but may not use such documents or emails to justify applying disciplinary measures to the employee or use such documents or emails as evidence in court if they indeed relate to the employee’s private life.

Special attention must be given to employee representatives who must be entirely free to carry out their duties.

Last updated on 15/09/2022



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When conducting an internal investigation (which must have a legitimate purpose), the employer must act in accordance with the principles of proportionality and subsidiarity. In line with these principles, the means of collecting and processing personal data during an internal investigation as well as the data that is searched, collected or processed, should be adequate, relevant and not excessive given the purposes for which the data is being collected or subsequently processed. These principles can be complied with by, for example, using specific search terms when searching electronic data, limiting the investigation’s scope (subject matter, period, geographic locations) and, in principle, excluding an employee's private data.

The employer is, in principle, allowed to access documents, emails and internet connection history saved on computers that were provided to the employees to perform their duties, provided the requirements of proportionality and subsidiarity are taken into account. In other words, reading the employee's emails or searching electronic devices provided by the employer must serve a legitimate purpose (e.g. tracing suspected irregularities or abuse) and the manner of review or collecting and processing the data contained

in such emails should be in accordance with the principles of proportionality and subsidiarity.

The employer can ask the employee to hand over an employee's USB stick for an investigation. Depending on company policies and (individual or collective) employment agreements, an employee is, in principle, not obliged to comply with such a request. A refusal from an employee, when there is a strong indication that this USB stick contains information that is relevant to an investigation into possible irregularities, may be to the disadvantage of an employee, for example in a dismissal case.

The following factors, which derive from the *Bărbulescu* judgment of the European Court of Human Rights, are relevant to the question of whether an employee's e-mail or internet use can be monitored:

- whether the employee has been informed in advance of (the nature of) the possible monitoring of correspondence and other communications by the employer;
- the extent of the monitoring and the seriousness of the intrusion into the employee's privacy;
- whether the employer has put forward legitimate grounds for justifying the monitoring;
- whether a monitoring system using less intrusive methods and measures would have been possible;
- the consequences of the monitoring for the employee; and
- whether the employee has been afforded adequate safeguards, in particular in the case of intrusive forms of monitoring.

These requirements can sometimes create a barrier for employers, as seen in a ruling by the District Court Midden-Nederland (16 December 2021, ECLI:NL:RBMNE:2021:6071) in which the employer had used information obtained from the employee's e-mail as the basis for a request for termination of the employment contract. In the proceedings, the employee argued that his employer did not have the authority to search his e-mail.

According to the District Court, it was unclear whether the employer had complied with the requirements of *Bărbulescu* regarding searching the employee's e-mail. The regulations submitted by the employer only described the processing of data flows within the organisation in general. Therefore, the District Court found that the employer did not have a (sufficient) e-mail and internet protocol and the employee was not properly informed that his employer could monitor him. In addition, according to the District Court, it was unclear what exactly prompted the employer to search the employee's e-mail, as the employer did not provide any insight into the nature and content of the investigation. As a result, the District Court was unable to determine whether the employer had legitimate grounds to search the employee's e-mail. On this basis, the District Court disregarded the (possibly) illegally obtained evidence and ruled against the employer's termination request.

Last updated on 27/11/2023

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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.

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



France

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Evidence obtained in the context of an investigation must specify who provided it and the date it was provided. No retaliatory measures may be taken against the whistleblower for the act of whistleblowing.

In certain cases, the whistleblower report must be forwarded to the judicial authorities (eg, when there is an obligation to assist persons in imminent danger, for serious offences or a disclosure that a vulnerable person is in danger (ie, minors under 15 or a person who is unable to protect themselves)).

Last updated on 15/09/2022



Netherlands

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The former Act on the House for Whistleblowers already provided for several preconditions that a whistleblowing procedure must meet. For example, internal reporting lines must be laid down, as well as how the internal report is handled, and an obligation of confidentiality and the opportunity to consult an advisor in confidence must be applied. Employers are obliged to share the whistleblowing policy with employees, including information about the employee's legal protection. The employee who reports a suspicion of wrongdoing in good faith may not be disadvantaged in their legal position because of the report (section 17e/ea Act House of Whistleblowers).

The starting point is that an employee must first report internally, unless this cannot reasonably be expected. If the employee does not report internally first, the House for Whistleblowers does not initiate an investigation. The House for Whistleblowers was established on 1 July 2016 and has two main tasks: advising employees on the steps to take and conducting an investigation in response to a report.

The Act on the Protection of Whistleblowers, which entered into force in 2023, introduced several changes, of which the most relevant are:

- Abolition of mandatory internal reporting: the obligation to report internally first is abolished. Direct external reporting is allowed, such as to the House for Whistleblowers or another competent authority. When reporting externally, the reporter retains his protection. However, reporting internally first remains preferable and will be encouraged by the employer as much as possible.
- Expansion of prohibition on detriment: the prohibition on detriment already included prejudicing the legal position of the reporter, such as suspension, dismissal, demotion, withholding of promotion, reduction of salary or change of work location. It now also includes all forms of disadvantage, such as being blacklisted, refusing to give a reference, bullying, intimidation and exclusion.
- Stricter time limit requirements for internal reporting: the reporter must receive an acknowledgement of receipt of the report within seven days and the reporter must receive information from the employer on the assessment of their report within a reasonable period, not exceeding three months.
- Extension of the circle of protected persons: not just employees, but third parties who are in a working

relationship with the employer are now also protected, such as freelancers, interns, volunteers, suppliers, shareholders, job applicants and involved family members and colleagues.

Last updated on 27/11/2023



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

10. What confidentiality obligations apply during an investigation?



France

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Interviewers, investigators, interviewees or any others involved in the investigation are often bound by a reinforced confidentiality obligation, particularly when the internal investigation is triggered by a whistleblower alert. In addition, every person that comes to know of the investigation, facts or people involved is bound by an obligation of discretion. Furthermore, investigators should specifically be trained for interviews and be reminded of their obligations relating to the investigation.

The investigators will need to determine the order of the tasks to be carried out in the investigation, as this will have a significant impact on confidentiality management. Should they start with the hearings or a review of documents? The answer may depend on the subject matter of the investigation. It is advisable to first review the documentation before organising interviews, particularly to avoid the destruction of certain documents by employees acting in bad faith or by those wishing to erase the traces of alleged wrongdoing. Sometimes, however, it is possible to start with the interviews, especially in the case of harassment, as there may be no documents to review. If the decision is taken to conduct the documentation review after the interviews, it could be useful to ask the employees involved to sign a document stating that they must preserve and retain documents, meaning that if they delete or destroy documents, they would be acting against the company and in breach of the law.

Last updated on 15/09/2022



Netherlands

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The principle of due care requires employers to act prudently when it comes to sharing the identity of persons involved, such as complainants and implicated persons; and investigative findings, notably when

certain employees may be implicated. As a result, such information is usually shared within an employer to designated departments on a need-to-know basis only. Additional safeguards as to the protection of whistleblowers' identities apply since the Whistleblower Directive (see question 9) was implemented in Dutch law. Also, see question 13 for the confidentiality obligations of employees vis-à-vis their employer.

Last updated on 27/11/2023

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

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

France

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According to the French data protection authority, the employee under investigation must be informed of the name of the person in charge of the investigation, the alleged facts that have led to the whistleblowing alert and their rights to access and rectify data collected about them. This information must be given as

soon as the data collection starts, before the interviews, as per GDPR principles.

Last updated on 15/09/2022



Netherlands

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An implicated person is typically provided with a summary description of the scope of the investigation and, hence, the allegations against such an employee (if any). This is usually done in the interview invite sent to the relevant interviewee, which also provides an opportunity to prepare for an interview and (if relevant) seek legal advice.

Last updated on 15/09/2022



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.

Last updated on 15/09/2022

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



France

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The identity of the complainant must be kept confidential and cannot be disclosed. There are two exceptions: if the complainant consents to the disclosure; or if the employer is asked for this information by the judicial authorities.

Last updated on 15/09/2022



Netherlands

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Such information can usually be kept confidential in an internal investigation, subject to potential disclosure obligations (see question 25). As indicated in question 10, depending on the nature and subject matter of an investigation, the identity of employees involved and investigative findings shall be shared with an employer on a need-to-know basis only. Specific requirements apply to the protection of the identity of whistleblowers since the Whistleblower Directive was implemented into Dutch law.

Last updated on 27/11/2023



Switzerland

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

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

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

Last updated on 15/09/2022

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



France

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Most of the time, the legal protection afforded by the legally prescribed confidentiality obligation that applies to whistleblowing is sufficient. This is all the more so given every person involved is bound by an obligation of discretion. However, there is no legal obstacle to the creation of an NDA between the employer and the people involved.

NDAs setting out a strict and reinforced obligation of confidentiality and discretion during the investigation should be signed by any external parties involved (eg, translation agency, IT expert) or when the internal investigation is outside the scope of whistleblowing regulations.

Last updated on 15/09/2022



Netherlands

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Yes, NDAs can be used for this purpose. However, employers in the Netherlands often rely on general confidentiality obligations that the relevant employee already has to adhere to vis-à-vis their employer, for example in the employment agreement or collective labour agreement, if applicable. It is good practice to reiterate the confidential nature of any interview and its contents, and the existence of the investigation as such, to avoid any alleged confusion as to the confidential nature of investigative procedures later on.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

14. When does privilege attach to investigation materials?

France

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Privilege does not generally apply to internal investigation materials as the investigation does not constitute a relationship between a lawyer and their client, and even less so a judicial investigation. However, if a lawyer is appointed as an investigator, privilege may apply to materials exchanged between the lawyer and that client.

Last updated on 15/09/2022

Netherlands

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If an attorney is engaged to provide legal advice or representation in respect of the (subject matter of the) investigation and as such also conducts (part of) the investigation, work products prepared by such an attorney will typically be subject to the legal privilege. Such work products may include, for example, interview minutes, investigation reports, investigation updates, attorney-client correspondence on the investigation, and legal advice rendered in connection with the (subject matter of the) investigation.

Last updated on 15/09/2022

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.

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?



France

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The employee under investigation has the right to be assisted by a lawyer during the interviews and, if the employee chooses to be so, the lawyer must also always be present. The employee may not, however, be accompanied by anyone other than a legal representative (ie, another employee cannot attend the interview).

Last updated on 27/11/2023



Netherlands

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All parties involved in the investigation have the right to a fair hearing. How this is embedded in the investigation should be laid down in the protocol drawn up at the start. When the employee, and others involved, receive an invitation for an interview in the context of an investigation, this invitation should include whether or not the employee has the right to bring legal representation to the interview. Given the unequal relationship between employer and employee, this will most likely be the case.

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.

Last updated on 15/09/2022

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



France

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Neither the works council nor the trade unions have any right to be informed or involved in the investigation. It is the employer who is responsible for carrying out the investigation. However, when the investigation is triggered due to a works council issuing an alert relating in particular to a “serious and imminent danger”, one member of the works council must be involved in the investigation process.

Last updated on 15/09/2022



Netherlands

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There is, in principle, no role for the works council in an "isolated or single" internal investigation. When it comes to structural forms of employee monitoring to measure behaviour (such as video surveillance), the

proposed decision to implement such a monitoring system in principle requires the prior approval of the works council.

In addition, according to the Act on the Protection of Whistleblowers, an employer who is not obliged to set up a works council needs the consent of more than half of the employees when adopting the internal reporting procedure under the Act, unless the substance of the procedure has already been laid down in a collective bargaining agreement.

Last updated on 27/11/2023

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.

Last updated on 15/09/2022

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

France

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Apart from being informed of any facts and data concerning them being collected during the investigation, employees involved in the investigation do not have any specific rights. Some companies choose to use external firms specializing in psychosocial risk management, not only to conduct internal investigations, but also to provide additional psychological support for their employees, as part of the employer's safety obligation.

Last updated on 27/11/2023

Netherlands

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The employer can offer employees to be accompanied by another person, or by legal counsel, especially if the outcomes of the investigation could have consequences for their employment.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

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



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Unrelated matters revealed during the investigation do not necessarily mean that another investigation will be opened. Nevertheless, if reprehensible acts unrelated to the current investigation are revealed, the employer will need to take action and sanction the perpetrator (after checking the facts). Sometimes the only way to check the facts is to carry out another investigation on a separate matter. However, the investigation team may also consider if there is enough connection between the matters to widen the scope of the current internal investigation.

Last updated on 15/09/2022



Netherlands

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If the investigation yields unrelated matters, the employer will need to decide whether such matters should be followed up in the same or a separate investigation. If such matters include new allegations against an employee that are already involved in the investigation, the employer should, before interviewing (or at the start of such an interview) inform the implicated employees of the relevant new allegations that are the subject of the investigation.

Last updated on 15/09/2022

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

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

France

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The grievance may also have to be investigated (eg, moral/sexual harassment reported by an employee under investigation).

Last updated on 15/09/2022

Netherlands

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There are a lot of possibilities for grievances that employees can raise during an investigation. A grievance, for instance, could be that a certain person is not interviewed, while the employee wanted this person to be interviewed in order to have a thorough investigation. In such a case the investigator needs to assess this grievance.

There is no general rule how to react to a grievance and there is also no general obligation to respond to a grievance. There needs to be a case by case assessment based on which further action is or isn't needed.

Last updated on 27/11/2023

Switzerland

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

However, if the employer terminates the employment contract due to a justified legal complaint raised by

an employee, a court might consider the termination to be abusive and award the employee compensation in an amount to be determined by the court but not exceeding six months' pay for the employee (article 336 paragraph 1 (lit. b) and article 337c paragraph 3, Swiss Code of Obligations). Furthermore, a termination by the employer may be challenged if it takes place without good cause following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee (article 10, Federal Act on Gender Equality).

Last updated on 15/09/2022

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



France

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The investigation will likely be able to continue with the other employees and, as soon as the employee under investigation returns from sick leave, they will be able to be interviewed.

However, as disciplinary sanctions are time-barred after two months from the moment the misconduct was committed or from when the employer becomes aware of it, if the sick leave lasts for the whole of that period, the investigation must be conducted anyway. In this instance, the investigator can ask the employee to attend the interview despite being on sick leave or arrange for the interview to take place using other means (eg, conference call). As a last resort, a questionnaire can be sent to the employee, but the pros and cons must be assessed as this is a way of information gathering that carries a certain amount of risk, could be less reliable and is of less probative value.

Last updated on 15/09/2022



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If the employee under investigation goes off sick during the investigation, they will generally be treated as a regular employee on sick leave, meaning they are entitled to continued salary payment and that both employer and employee have a reintegration obligation. This entails regular consults with the company doctor to determine how recovery progresses and when the employee can return to work. If the employer suspects that the employee is merely calling in sick to delay the investigation and such suspicion is not confirmed by the company doctor, the employer can ask the Employees Insurance Agency (UWV) to give a second opinion. When it is determined that the employee is in fact fit for work, the employer can oblige the employee to return to work and cooperate with the investigation. If the employee fails to comply, the employer can – after due warning – suspend the employee's salary payment.

Last updated on 27/11/2023



Switzerland

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The time spent on the internal investigation by the employee should be counted as working time^[1]. The general statutory and internal company principles on sick leave apply. Sick leave for which the respective employee is not responsible must generally be compensated (article 324a paragraph 1 and article 324b, Swiss Code of Obligations). During certain periods of sick leave (blocking period), the employer may not ordinarily terminate the employment contract; however, immediate termination for cause remains possible.

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

[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

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



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A criminal investigation always takes precedence over other investigations. However, this does not mean that the internal investigation has to stop. It can and should continue, and the report drawn up upon completion of the investigation could be used by the authorities in the criminal investigation. In some cases, especially when privilege does not apply, police or regulatory authorities may request that the employer share such evidence. However, even when privilege does apply, there is no certainty that the evidence would not have to be communicated to certain authorities.

Some administrative authorities often challenge the application of legal privilege or try to reduce its scope. For example, the French financial markets authority (AMF) regularly puts forward its view of legal privilege, according to which an email where a lawyer is only copied (and is not one of the main recipients) in from one of their clients is not confidential and can therefore be disclosed in proceedings. However, if the AMF investigators impose disclosure of privileged documents, this should result in the annulment of the investigation procedure. By way of exception, legal privilege cannot be invoked against certain other authorities, such as the URSSAF (authority in charge of collecting social security contributions) or the DGCCRF (directorate-general for competition, consumer protection and anti-fraud investigations). Where legal privilege is enforceable, the judge must first determine whether the documents constitute correspondence relating to defence rights and, second, must cancel the seizure of documents that they find to be covered by legal privilege due to the principle of professional secrecy of relations between a lawyer and their client and the rights of defence.

Last updated on 15/09/2022



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In case there is a parallel criminal or regulatory investigation usually consultation between the investigators and the authorities takes place. Agreements are then sometimes made about the investigation conducted by / for the employer. In some cases, the authorities will ask to stay the investigation. There is no policy from the government on this topic.

There are situations where the authorities can compel the employer to share evidence. This depends on the exact circumstances of the case. For instance if the employer is the suspect in a criminal case.

It does occur that the authorities are given evidence upon request without the authorities having to order the extradition of evidence.

Last updated on 15/09/2022



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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

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



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The employee under investigation, like the other employees interviewed and the whistleblower, must be informed that the investigation has been completed. However, there is no obligation to provide them with the report and, for reasons of confidentiality, it is very often best not to do so.

Last updated on 15/09/2022



Netherlands

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There are no statutory requirements as to employee feedback in internal investigations. The principle of due care requires an employer to typically confront implicated persons with any allegations that concern them; and provide a draft report on their interviews for feedback, if the investigative findings will form the basis of disciplinary measures. It is good practice to also inform an employee under investigation once the

investigation is closed.

Last updated on 27/11/2023



Switzerland

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

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.^[1] In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.^[2]

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

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

Last updated on 15/09/2022

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



France

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There is no obligation to share the investigation report. The findings, or a summary of them without revealing any confidential information, may be disclosed, but it is the employer's responsibility to keep the identity of every person interviewed confidential.

Last updated on 15/09/2022



Netherlands

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Employers are typically not required to share the investigation report with implicated persons or other employees involved in an investigation. Depending on the nature and subject of the investigation, the principle of due care may require an employer to share (draft) investigative findings before concluding on

such findings.

Last updated on 15/09/2022



Switzerland

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

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

Last updated on 15/09/2022

24. What next steps are available to the employer?



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The employer can decide to sanction the person who was under investigation or to close the case. The employer may also need to protect any victims, witnesses and whistleblowers. If, during the investigation, it is discovered that a supplier or other commercial partner is implicated, the relevant contract may be terminated. The employer can take legal action, file a complaint (if the company is a direct victim of a criminal offence) or report the offence to the public prosecutor's office. The employer must archive the file or ensure its lawful preservation after a certain period.

Last updated on 15/09/2022



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A distinction can be made between a non-public reprimand and a public reprimand. A non-public reprimand is a warning from the employer to the employee that certain behaviour by the employee may not be

repeated. This is a relatively light measure. The employer can apply this measure to behaviour for which a verbal warning is insufficient or has already been given (more than once). The employer should confirm the reprimand to the employee in writing, so that it forms part of the employee's personnel file. It is important to have an acknowledgement so there is no dispute as to whether the reprimand has reached the employee. Often, the letter will also mention the consequences if the employee continues to behave in this way, so that the employee is aware of them. The employer then has reasonable grounds to apply a more severe disciplinary measure, such as suspension or dismissal, should the behaviour be repeated.

For a public reprimand, the warning is also made known to third parties. This is, therefore, a more severe measure than a non-public reprimand, as the honour and reputation of the employee are affected. A public reprimand must, therefore, be proportionate to the seriousness of the behaviour and will only be possible in the event of a serious offence, for which a non-public warning will not suffice. A public reprimand is also more likely if it is necessary to prevent other employees from engaging in the same behaviour (deterrent effect). Given the impact on the employee, it is important that the employer carefully investigates the facts and allows the employee to tell their side of the story (hearing both sides of the argument). A public reprimand is rarely given.

If the outcome of the investigation is that the employee is culpable, the employer can request that the court dissolves the employment agreement for that reason. The employer will have to show that continuation of the employment agreement is no longer possible. If the court rules that the employee is culpable, the employment agreement will be dissolved, observing the relevant notice period and paying the statutory transition payment. Only if the court rules that the employee has shown serious culpable behaviour, will the notice period not be taken into account and the transition payment will not be due.

If the employee has come into contact with the judicial authorities or is suspected of a criminal offence, but has not been convicted or detained (yet), the employer – when requesting the dissolution of the employment contract – will have to make a plausible case that, based on this suspicion alone, it can no longer be reasonably expected that the employment contract is upheld. This may be the case in a situation where the offence the employee is suspected of has repercussions on the employer, colleagues or customers and relations of the employer. In this situation, the court will assess whether a less drastic measure than dismissal, such as suspension, is sufficient to the interests of the employer.

If there is still no conviction but the employee is unable to perform his or duties due to being detained, the court reviews a request for dissolution in the same way as above. In this case, if the employee's payment of wages is discontinued, justice may already have been done to the employer's interests.

The final stage involves the conviction and detention of the employee. Although the dissolution of the employment contract under section 7:669 (3) under h DCC – which includes conviction and detention – is the most obvious option, it is still necessary to assess whether termination of the employment contract is reasonable because of the employee's conviction and detention. Although the seriousness of the offence, the duration of the detention and how this reflects on the employer are important factors, the court also takes the age, duration of the employment contract and the position of the employee on the labour market into account.

The most far-reaching dismissal method that can be considered is instant dismissal for an urgent reason (section 7:678 paragraph 1 in conjunction with section 7:677 paragraph 1 DCC). According to the case law of the Dutch Supreme Court, the question of whether there are compelling reasons must be answered based on all the circumstances of the case – to be considered together – including the nature and seriousness of what the employer considers to be compelling reasons, the nature and duration of the employment, how the employee performed their duties and the personal circumstances of the employee, such as age and the consequences for the employee of an instant dismissal.

Mere suspicion of a criminal offence will not easily qualify as an urgent reason, as follows from jurisprudence. At the same time, an employer can, instead of criminal suspicion as grounds for dismissal, also base its claim on the behaviour that underlies it. If the behaviour of the employee is already factually established, for example, because the employee has disclosed it to their employer or the employer has established it, the employer does not have to wait for the criminal proceedings before dismissing the employee.

Switzerland

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

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

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

Last updated on 15/09/2022

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?

France

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The findings must be submitted to the employer or management, but there is no obligation to disclose them to anybody else. The only exception is if a judicial investigation has been opened. In this case, the entire report must be provided to the authorities if the judge requests this. Normally the investigators only take written notes and there is no audio or video recording, unless the employee consents. Whether or not to make a voluntary disclosure of wrongdoing is a tactical decision for companies. Disclosure may mitigate fines and penalties or even help the employer avoid liability entirely. However, the downsides of disclosure include increased costs, the possibility of a follow-on government investigation and exposure to penalties. Thus, most companies assess their options on a case-by-case basis to determine what steps would be in the best interests of the company.

Last updated on 15/09/2022

Netherlands

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The fundamental right to a fair hearing entails that the investigation findings must be disclosed to the employee under investigation at least once, so that they are given the opportunity to respond to them. Under Dutch administrative or criminal law, there are no general provisions requiring disclosure of investigative findings to regulators or criminal authorities. Certain specific provisions, however, apply, for example, in reportable incidents at financial institutions or certain HSE incidents that need to be disclosed to relevant regulatory authorities. Regulatory and criminal authorities, however, do have broad investigative powers enabling them to order the provision of data from subjects or involved parties in investigations they are conducting. Such information may also comprise investigation findings and underlying documents, such as interview records. If such interview records are subject to legal privilege (see question 14), they are typically not subject to disclosure to the relevant authorities.

Under Dutch civil law, a party that possesses certain records (such as investigation findings and underlying documents) is generally not required to disclose those to other parties for inspection. Parties are, in principle, not required to share information with third parties, other than relevant authorities (see above).

An exception to this rule is section 843a Dutch Code of Civil Procedure. Under section 843a, a party can be required to produce specific exhibits, if:

- the requesting party has a legitimate interest;
- the request concerns specific and well-defined records or information (ie, no fishing expeditions); and
- the documents pertain to a legal relationship (e.g., a contract or alleged tort; the requested party does not need to be a party to the relevant legal relationship).

If these requirements are met, the requestee should, in principle, disclose the requested information, except for specific exceptions. Such exceptions, which can also be relevant in the context of internal (workplace) investigations, could include confidentiality arrangements and privacy protection, to the extent that this would qualify as a compelling interest. To establish such a compelling interest, the relevant interest should outweigh the requesting party's legitimate interest regarding the requested information. This is a balancing act. Documents that are subject to legal privilege are protected against disclosure.

Last updated on 27/11/2023



Switzerland

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The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.^[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.^[2]

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

^[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romero/Claudio Bazzani (Hrsg.), Interne und regulatorische Untersuchungen, Zürich/Basel/Genf 2016, p. 102 et seq.

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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If the outcome of the internal investigation has led to the sanctioning of an employee, this sanction may no longer be invoked to support a new sanction after three years. Moreover, under the GDPR principles, the duration of retention must be proportional to the use of the data. Therefore, the data must be retained only for a period that is “strictly necessary and proportionate”. If the employer wants to keep information about the investigation in the longer term, it is possible to archive the employee's record even though the employer will no longer be able to use it against the employee after three years.

Last updated on 15/09/2022

Netherlands

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The outcomes are usually kept in the records until termination of the employment agreement and only deleted when personal records are deleted.

Last updated on 15/09/2022

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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.

Last updated on 15/09/2022

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

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Within the context of an investigation following a whistleblower alert, any violation of the confidentiality obligation is punishable by two years' imprisonment and a €30,000 fine.

If the employer fails to comply with its obligation to protect its employees' safety, the employer will be liable for damages resulting from any failings during the investigation (eg, if sexual harassment is reported and no action is taken by the employer)

Last updated on 15/09/2022

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The employee can request compensation for violation of the right to a fair hearing or reputational damage. If the employee is suspended during the investigation, the employee can request the court to order the employer to allow them to resume their work and request rehabilitation.

In termination proceedings (or after the termination of the employment agreement by the employer), the employee can claim an equitable compensation from the employer if the employer has shown serious culpable behaviour. Such compensation, if granted, is usually based on loss of income by the employee due to the behaviour of the employer.

Last updated on 27/11/2023

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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.

Last updated on 15/09/2022

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