

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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01. What legislation, guidance and/or policies govern a workplace investigation?

Netherlands

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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

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

Netherlands

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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

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

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days

thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

[1] Ullin Streiff/Adrian von Kaenel/Roger Rudolph, Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR, 7. A. 2012, Art. 328b N 8 OR.

Last updated on 15/09/2022

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