

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May

Clare Fletcher at Slaughter and May

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

There are no specific legislative requirements for workplace investigations in Germany. In 2020, the Federal Ministry of Justice presented a draft bill with regulations on internal investigations and, in particular, employee interviews. However, this law failed to pass under the previous government. The current government has announced it will take up this matter again and plans to create a precise legal framework for internal investigations. Details, timing and content remain to be seen.

Nevertheless, workplace investigations do not take place in a "lawless space". They must comply with the provisions of employment and data protection law. Further, criminal and corporate law aspects can play a role. Moreover, works council information and co-determination rights may have to be taken into account.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

In Ireland, employees have a constitutional right and an implied contractual right to natural justice and fair procedures. If a workplace investigation is not conducted in accordance with these principles, an employee may allege that the investigation is fundamentally flawed. If such an allegation is made then an employee may seek recourse from the Workplace Relations Commission (WRC) or potentially the High Court. The WRC is the body in Ireland tasked with dealing with employment law-related claims, including unfair dismissal.

The constitutional rights that employees enjoy were specified in the Supreme Court case of *Re Haughey* in 1971. That case held that where proceedings may harm the reputation of a person, public bodies must afford certain basic protections of constitutional justice to a witness appearing before it. It further stated that article 40.3 of the Irish Constitution is a guarantee to the citizen of basic fairness of procedures. These protections, known as "Re Haughey rights" are implied in each contract of employment.

A Code of Practice was introduced in 2000, namely S.I. No. 146/2000 - Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 (the Code). The Code set out the procedures for dealing with grievances or disciplinary matters, which must comply with the general principles of natural justice and fair procedures and include:

- that employee grievances are fairly examined and processed;
- that details of any allegations or complaints are put to the employee concerned;
- that the employee concerned is allowed to respond fully to any such allegations or complaints;
- that the employee concerned is given the opportunity to avail of the right to be represented during the procedure; and
- that the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

Further Codes of Practice on the prevention and resolution of bullying at work and on dealing with sexual harassment and harassment at work were published in 2021 and 2022, respectively. The provisions of these codes are admissible in evidence before a court, the WRC and the Labour Court.

In addition to the above, the Data Protection Commission published Data Protection in the Workplace: Employer Guidance in April 2023.

All employers should have specific and up-to-date policies dealing with how workplace investigations will be carried out that are suitable for their organisation. These policies may vary, depending on the subject of the investigation and the size and type of employer. However, all should adhere to the principles identified above to ensure that a robust policy is in place and can be utilised.

Last updated on 11/10/2023



Switzerland

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

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

Last updated on 15/09/2022



Turkey

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

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

Last updated on 15/09/2022

Q2. How is a workplace investigation usually commenced?



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

Typical triggers for a workplace investigation may be internal hints (eg, from employees), internal audits, compliance or the legal department. However, investigations by the public prosecutor or other authorities can also lead to a workplace investigation.

There are no strict guidelines for the course of the investigation. The measures to be taken and the sequence in which they will be carried out to clarify the facts must be decided on a case-by-case basis. However, the first step should be to secure evidence. All relevant documents and records (eg, e-mails, hard disks, text messages, data carriers, copies) should be collected and employees may be interviewed. The second step should be to evaluate the evidence and the third step is to decide how to deal with the results (eg, whether any disciplinary measures should be taken or the intended procedures should be adjusted).

Irrespective of how a workplace investigation is commenced, when it comes to severe breaches of duty by an employee, a two-week exclusion period for issuing a termination for cause must be observed at all stages. This two-week period starts when the employer becomes aware of the relevant facts but is suspended as long as the employer is still investigating and collecting information, provided that the investigation is carried out swiftly.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Investigations can start in multiple ways. They usually stem from an employee raising a grievance, a bullying complaint, or a possible protected disclosure. Investigations may also stem from the employer in a disciplinary context, or indeed can be commenced if an external complaint or issue is raised by a third party of the organisation.

The first thing the employer must consider is whether an investigation is necessary. It may be that the issue at hand can be resolved informally or is of such a nature that it cannot be investigated, either through a lack of detail or simply because the subject of the complaint is no longer an employee. Any such decision to investigate or not should be carefully documented.

The next step to determine is the nature of the investigation. It should be clear at the outset whether the investigation is simply a fact-gathering exercise or if the investigator will be tasked with making findings on the evidence. The distinction is significant as a fact-gathering investigation can proceed without prompting the full panoply of rights, but the basic principles of fairness should still be applied. A fact-gathering investigation should determine whether there is or is not, a case to answer. If a disciplinary hearing follows then the rights outlined in question 1 will apply at that stage. If it is a fact-finding investigation, the rights apply from the outset of the process. The employee who is required to respond to the issues (the respondent) should be fully aware of the extent of the investigation. The investigator appointed to do the investigation should be clear about what is expected of them.

If the employer believes an investigation is necessary, it should be acknowledged and started without delay. In particular, according to the Protected Disclosures legislation, a report should be acknowledged within seven days.

An employer should consider and identify the scope of the investigation and establish who will investigate the matter. Terms of reference under which the investigation will be carried out should be established by the employer and shared with the employee raising the issue (the complainant). An employer should not seek agreement on the terms, but invite commentary to ensure that the full scope of the investigation is captured within the terms of reference. Robust terms of reference that lay down the clear parameters of the investigation will assist the investigator and all parties involved in the process.

Last updated on 11/10/2023



Switzerland

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

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



Turkey

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

The need to initiate an internal investigation may arise from the receipt of information from various sources. Reporting is one of the most common sources and can be in different forms. In Turkey, while conventional methods such as reporting to a direct supervisor, human resources or executives is quite common, whistleblowers also use reporting mechanisms such as web-based forms, telephone hotlines or e-mail, if such mechanisms exist. It is critical to obtain as much information as possible from the complainants at this initial contact, to make a sound decision on whether or not to commence an investigation. There is no requirement to decide to start an investigation and it can be commenced through a corporate resolution (eg, ethics committee resolution or board resolution) of a decision-making body or a decision of the body or person who has such authority under the company policies. The investigation team who will conduct the process may also be approved by the company's decision-making body. It is also advisable to have a preliminary inquiry for the complaints, before commencing a fully-fledged investigation.

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdeci*
at Hengeler Mueller

Generally, under German employment law, an employee has a right to perform his^[1] work and, therefore, suspending an employee would only be possible with the employee's consent. If an employer decided to suspend an employee without his consent, the employee could then claim his right to employment has been affected and seek a preliminary injunction before the competent labour court.

Unilaterally suspending an employee is, in principle, not permissible. Exceptions are made in cases where the employer has a legitimate interest. Typically, such legitimate interest exists after the employer has issued a notice of termination. During a workplace investigation, the employer may have a legitimate interest in suspending the employee, for example, if there is a risk that evidence may be destroyed, colleagues may be influenced, or the employee's presence may otherwise have a detrimental effect on the investigation or employer. Whether or not there is a legitimate interest must be assessed in each case. In practice, it is rare for employees to take legal action against a suspension.

In any event, during a suspension, the employee would be entitled to further payment of his salary without the employer receiving any services in return.

^[1] The pronouns he/him/his shall be interpreted to mean any or all genders.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Workplace suspensions in Ireland are a contentious issue and can result in an employer defending injunction proceedings in the High Court before an investigation has started.

In the case of *Governor and Company of the Bank of Ireland v Reilly*, the judge stated: "The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing."

In the 2023 case of *O'Sullivan v HSE*, the Supreme Court held that the Health Service Executive acted fairly and reasonably as an employer in suspending a consultant doctor after he had performed experiments on patients without their consent. This ruling overturned the Court of Appeal's earlier decision that previously found the suspension to be unlawful, as the consultant did not represent an immediate threat to the health of patients.

The Supreme Court considered whether the employer's decision to place the consultant on administrative leave met the test set out in the English case of *Braganza v BP Shipping Limited & Anor*. In that case, the court held that the decisionmaker's discretion would be limited "by concepts of good faith, honesty and genuineness and the need for absence of arbitrariness, capriciousness, perversity and irrationality."

In relying on the principles set out in the *Braganza* case, the Irish courts have reinforced the right of a

decision-maker in an employment context to have discretionary power when implementing a suspension and that any decision to do so must be made honestly and in good faith. Employers should obtain legal advice when considering whether to suspend an employee in any circumstance.

Last updated on 11/10/2023



Switzerland

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

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



Turkey

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

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

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

Last updated on 15/09/2022

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

It is up to the company to decide who should carry out the workplace investigation and individual investigative steps. If their staff is used, the question arises of which person or department (compliance, legal, internal audit, HR or management) should take the lead. The answer to this question may depend on various factors such as the number of employees affected by the workplace investigation and the nature of the alleged misconduct. In any event, due to various employment law and data protection issues, the HR department and the legal department should be involved.

Further, it may make sense to bring in external advisors to lead the investigation together with an internal investigation team of the company. The engagement of an external investigation team can also be advantageous concerning the two-week exclusion period for termination for cause. This period does not start to run as long as the external advisors are investigating, but only when the persons authorised to terminate employment receive the investigation report.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

An investigator does not have to hold any minimum qualifications. More often than not it is an employee's manager or HR manager who is carrying out the investigation. Crucially, the person carrying out the investigation must not be involved in the complaint, as an argument of bias could be made before the investigation begins. The investigator should also be of suitable seniority to the respondent and have the necessary skills and experience to carry out an investigation. If a recommendation by the investigator is made to progress the matter to a disciplinary process, which may in turn be the subject of the appeal, there should be adequate, neutral personnel within the organisation to deal with each stage. Again if the investigator and the disciplinary decisionmaker are the same person, an argument of bias will be made that will usually lead to a breach of fair procedures and any decision being unsustainable. Frequently, employers outsource the investigation to an external third party as there may simply not be adequate personnel within the organisation to carry out the process. Employers should ensure that within their policies the right to appoint an internal or external investigator is reserved.

Last updated on 11/10/2023

Switzerland

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

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.

Turkey

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

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

Last updated on 15/09/2022

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdeci*
at Hengeler Mueller

There is no general legal remedy against the conduct of the investigation itself. However, if individual measures are carried out in violation of the law (eg, data protection rules), the employee can take legal action against the specific measure through an interim injunction. In addition, the employee has the right to complain to the works council and ask for the works council's support if he feels that the employer has discriminated against him, has treated him unfairly, or that he has been adversely affected in any other way (section 84 paragraph 1 s 2, German Works Constitution Act (BetrVG)).

Additionally, the works council has the right to take legal action against investigative measures that were carried out in violation of its co-determination rights (see question 16).

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Arguably yes, but it is the exception rather than the rule and it will depend upon the circumstances of the case. Generally, courts would be slow to intervene in ongoing workplace investigations. However, an employee may seek injunctive relief to prevent an investigation if they can show that the investigation is being conducted in breach of a policy or breach of fair procedures to such an extent that there is no reasonable prospect that the investigation's outcome(s) could be sustainable.

Last updated on 11/10/2023

Switzerland

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

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

Last updated on 15/09/2022

Turkey

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

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

Last updated on 15/09/2022

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

Since there is no mandatory law (yet) that provides a framework for workplace investigation interviews, there are also no special protective regulations for employees acting as witnesses.

Employees have a contractual duty to participate in interviews – be it as a suspect or as a witness – as part of workplace investigations. The employee must provide truthful information based on his duty of loyalty if:

- the questions relate to his area of work;
- the employer has an interest worthy of protection in obtaining the information; and
- the requested information does not represent an excessive burden for the employee.

Whether such a burden can be assumed when the employee must make statements by which he may incriminate himself is disputed in German case law and legal literature. The German Federal Labour Court has not yet decided on this question. Since an internal workplace investigation interview is an interview under private law and not under criminal law, there are, in our view, good arguments that the employee must also make a true statement even if he incriminates himself, provided his area of work is concerned. However, some labour courts assume that in these cases such a statement could not be used in criminal proceedings.

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Yes, but a qualified yes. To deny an employee who is the respondent to the complaint the right to cross-examine the complainant during a workplace investigation may amount to a breach of fair procedures. This does not mean in practice that a complainant or witness will have to physically or virtually attend a meeting to be subjected to cross-examination. What usually happens, in practice, is that specific questions of the respondent are put to the witness by the investigator for them to respond. On occasion and depending on the circumstances, the witnesses may respond in writing.

Generally, if witnesses do not wish to participate in workplace investigations and they are not the witnesses from whom the complaint originated, there is little that can be done. An employee may not want to be seen as going against a colleague, which impacts the wider issue of staff morale. An employer cannot force them to participate. Also an employee who is the respondent should be careful about seeking to compel witnesses to attend. While the respondent may request support from a colleague to act as a witness, that colleague may view things differently, which can lead to further issues.

In any event, employees cannot be victimised or suffer any adverse treatment for having acted as a witness.

Last updated on 11/10/2023

Switzerland

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

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, last visited on 17 June 2022.

^[2] Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on hrtoday.ch, last visited on 17 June 2022.

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

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

Last updated on 15/09/2022

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

When collecting data (in physical or digital form), the employer must ensure compliance with the data protection principles according to the General Data Protection Regulation (DSGVO) and the German Data Protection Act (BDSG). These principles include, among other things, that data collection must be carried out lawfully (principle of legality) and transparently (transparency principle) and must be comprehensively documented – specifically concerning the purpose of the workplace investigation – to be able to prove compliance with data protection.

The principle of legality states that data may only be collected on a legal basis (ie, there must either be a law authorising this or the employee must have consented to the collection of his data).

The transparency principle may constitute a special challenge during workplace investigations. Under the transparency principle, the employee must be generally informed about the collection of his data. This includes information on who processes the data, the purposes for which it is processed and whether the data is made available to third parties. However, there may be a risk of collusion, particularly when electronic data has to be reviewed, and thus the success of the investigation may be jeopardised if the relevant employee is comprehensively informed in advance. Accordingly, the employer should check, with the assistance of the data protection officer, whether the obligation to provide information may be dispensed with. This may be the case if providing the information would impair the assertion, exercise or defence of legal claims and the interests of the employer in not providing the information outweigh the interests of the employee. The respective circumstances and employer's considerations should be well documented in each case.

Regardless of whether the employee is informed about the investigation, to prevent data loss, the employee should be sent a so-called hold notice (ie, a prohibition to delete data). Additionally, to prevent automatic deletion, blocking mechanisms should also be implemented.

When gathering evidence by searching the employee's possessions or files, the employee's privacy rights also need to be observed (see question 8).

Last updated on 15/09/2022

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Under the GDPR (General Data Protection Regulation), personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. The Data Protection Commission published Data Protection in the Workplace: Employer Guidance in April 2023, which is a useful guide.

Employers should exercise caution when gathering physical evidence that may involve the use of CCTV or other surveillance practices. The Irish Court of Appeal in the case of *Doolin v DPC* examined the use by an employer of CCTV footage for disciplinary purposes and found such use constituted unlawful further processing. The original reason for processing the CCTV footage was to establish who was responsible for terrorist-related graffiti that was carved into a table in the staff tearoom. It subsequently transpired Mr Doolin, who was in no way connected to the graffiti incident, had accessed the tearoom for unauthorised breaks and a workplace investigation followed. The original reason for viewing the CCTV related to security, but further use of the CCTV footage in the disciplinary investigation was not related to the original reason. This case confirms that employers must have clear policies in place in compliance with both GDPR and the Data Protection Act 2018 specifying the purpose for which CCTV or any other monitoring system is being used. Not only that, but these policies must be communicated to employees specifying the use of such practices.

It is not only data about the investigation that must be processed fairly, but any retention of the data, which can only be further processed with good reason. It is a legitimate business reason to retain data to deal with any subsequent requests or appeals under various internal or statutory processes, provided employees have been advised of the relevant retention period.

Last updated on 11/10/2023

Switzerland

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

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

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

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

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

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

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

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

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

Last updated on 15/09/2022

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdeci*
at Hengeler Mueller

Files and documents that are purely business-related – whether in physical or digital form – may, in principle, be inspected by the employer without restriction. The employee has no right to refuse inspection.

When searching business laptops, computers, phones and e-mail accounts, a distinction must be made as to whether private use is permitted (or at least tolerated) or not: if the employee is allowed to use the items exclusively for business purposes, the employer may monitor and control them. If private use is permitted, the employee's right to privacy must be observed for private files, as must the protection of the secrecy of correspondence. Accordingly, the employer must avoid accessing private documents, files and e-mails. However, a review of private documents, files and e-mails may be permissible in the event of particularly serious violations if the employer's interest in the review outweighs the employee's interest in safeguarding his right to privacy. Generally, employers should allow private use of electronic devices only if employees have previously consented to the terms of use (including searches in certain cases).

A search of the employee's workplace by the employer is, in principle, permissible. However, a search of personal items (eg, bags, clothes, personal mobile phone) is generally only permissible with the employee's consent. Similarly to the review of digital personal data, a search of personal items may be permitted, however, in the event of particularly serious violations if the employer's interest in the search outweighs the employee's right to privacy.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

The first consideration here is what constitutes "employees' possessions". More often than not, employees will be using employer property and there should be clear policies in place that specify company property.

The difficulty arises if an employee is using personal equipment such as a mobile phone for work purposes. While there may be specific applications dealing with work-related matters that are accessible by the employer remotely, some applications may be device-specific and that is where issues may arise. In such instances, it is not unreasonable to ask the employee to provide such information or consent to a search of their personal property. However, this is the exception rather than the rule and all other legitimate avenues of obtaining such information should be explored first. Further, such requests for information should not be a fishing expedition as an employee has a reasonable expectation of privacy at work, which must be balanced against the rights of the employer to run their business and protect the interests of their organisation.

A search of physical items such as a desk or drawers should only be conducted in exceptional circumstances, even where there is a clear, legitimate justification to search and the employee should be present at the search.

Last updated on 11/10/2023

Switzerland

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

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.

Last updated on 15/09/2022



Turkey

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

There is no explicit answer to this question. However, it is important to make a distinction between employees' possessions and files that are strictly personal and employees' possessions and files that are found on devices or files provided for company use. For the first category, the employer does not have the right to search employees' possessions and files. For the latter category though, justifications need to be established, by observing the requirements explained in question 7. Furthermore, the employers must also ensure that employees are fully and explicitly informed in advance of the monitoring operations, either through a provision included in the employment agreement, or in a separate notice or employee policy, the receipt of which should be duly acknowledged by the employee.

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

In 2023, Germany has implemented the EU Whistleblowing Directive into national law with the German Whistleblower Protection Act (HinSchG).

The German Whistleblower Protection Act provides that companies with at least 50 employees must establish internal reporting channels as further set out in the law. Among other things, the confidentiality of the whistleblower as well as of the individuals affected by the report must be protected.

Further, whistleblowers must be protected from negative consequences that may arise from their reports. If the employment of a whistleblower were terminated or if the whistleblower were to be denied promotion after reporting a violation, the employer would have to prove that this was not related to the whistleblowing but was based on justified reasons.

Employers should familiarise themselves with the provisions of the new law.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Most whistleblowing policies will include a section that provides for an initial assessment of the complaint as to whether it meets the definition of a protected disclosure. This assessment, which ought to be carried out by a designated person who has been appointed to deal with disclosures, is a useful tool as some matters which may be labelled as whistleblowing may fall under the grievance procedure.

Where there are grounds, an investigation will be commenced. Under the Protected Disclosures (Amendment) Act 2022, whistleblowers are protected from penalisation for having made a protected disclosure, under the Act.

Penalisation may include; suspension, lay-off or dismissal; demotion, loss of opportunity for promotion or withholding of promotion; transfer of duties, change of location or place of work; reduction in wages or change in working hours; the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty); coercion, intimidation, harassment or ostracism; or discrimination, disadvantage or unfair treatment.

If an employee (which includes trainees, volunteers, and job applicants) alleges that they have suffered penalisation as a result of making a protected disclosure, they may apply to the Circuit Court for interim relief within 21 days of the date of the last act of penalisation by the employer.

A claim for penalisation may also be brought before the WRC within six months of the alleged act of penalisation. If an employee alleges that they were dismissed for having made a protected disclosure, the potential award that the WRC can make increases from the usual unfair dismissal cap of two years' pay to up to five years' gross pay, based on actual loss.

Where a complaint of whistleblowing is made, employers should ensure that they appoint investigators with the appropriate knowledge and expertise to deal with such a matter and comply with the time limits set by legislation.

Last updated on 11/10/2023

Switzerland

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

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

Last updated on 15/09/2022

Turkey

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

at Paksoy

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

Last updated on 15/09/2022

10. What confidentiality obligations apply during an investigation?



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

Depending on the subject of the investigation and the severity and significance of the suspected violation, employees who are involved in the workplace investigation may already have to maintain confidentiality based on their contractual duties. The prerequisite for this is that the employer has a legitimate interest in maintaining confidentiality. Criminal acts are not subject to confidentiality, but there is also no general obligation for the employee to report or disclose a criminal act to the authorities or the public prosecutor. However, reporting to the competent authorities may be required in certain cases (see question 25).

Lawyers are bound by professional confidentiality and are generally not allowed to provide information about any information they receive from their clients. An exception exists, for example, if the lawyer must provide information to defend himself in court proceedings. There is also no absolute protection against the seizure of documents at an attorney's office (see question 14).

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

This will depend on the nature of the investigation but, generally, investigations should be conducted on a confidential basis. All who participate in the investigation should be informed and reminded that confidentiality is a paramount consideration taken very seriously. However, it should be borne in mind that confidentiality cannot be guaranteed by an employer as the respondent in an investigation is entitled to know who has made complaints against them. Furthermore, the respondent is entitled to cross-examine the complainant and any witnesses, although in practice this right is rarely invoked strictly and is facilitated by the investigator, with questions from the respondent being put to the complainant and other witnesses.

On occasion, a breach of confidentiality may warrant disciplinary action, but this will depend on the circumstances. Exceptions to the requirement to keep matters confidential will of course apply where employees seek support and advice from others such as companions, trade union representatives or legal advisors. It may also not be possible to maintain confidentiality where regulators or the authorities are informed of the investigation.

Also, confidentiality may not be maintained if it is in the interests of the employer to communicate the

complaint and any subsequent investigation, for example on a health and safety basis.

Last updated on 11/10/2023

Switzerland

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

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

Turkey

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

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

Last updated on 15/09/2022

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

them?



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

In principle, the employer does not have to inform the employees about the investigation. Furthermore, there is no obligation to inform the "suspect" about the specific content of the workplace investigation itself and the allegations against him.

However, if personal data relating to the employee is collected and reviewed, the employee must be informed under German data protection principles (see question 7).

If the employer considers issuing a notice of termination based on the suspicion of wrongdoing, the employee must be allowed to comment on the allegations against him before receiving the termination notice. This requires that the employee be properly informed about the allegations and evidence against him. However, until the time of such a hearing, which usually follows the workplace investigation, there is no obligation on the part of the employer to inform the employee concerned about ongoing investigations.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Under the fair procedures outlined above, details of the allegations or complaints against the employee should be put to them to enable them to fully respond to the allegations raised. The employee should also be provided with any relevant policies pertaining to the allegations against them, along with all documentary evidence of the allegations and the specific terms of reference that define the scope of the investigation. The employee should also be informed of their right to be represented, see question 15.

Last updated on 11/10/2023



Switzerland

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

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



Turkey

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

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

Last updated on 15/09/2022

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

There is no general obligation on the part of the employer to disclose to the employee concerned the identity of the complainant, witnesses or other sources of information during the workplace investigation.

However, as described in question 11, the employee must be sufficiently informed of the allegations before a termination based on suspicion of wrongdoing is issued. This may also require disclosing the complainant's or witnesses' identity or other sources of information. In addition, the employer would have the burden of proof in the context of a legal dispute (eg, termination protection proceedings or proceedings about the legality of certain investigation measures) and may have to name witnesses and disclose sources of information.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Failure by an employer to provide the identity of the complainant, witnesses or sources of information seriously impinges upon the employee's right to fair procedure and could result in a flawed investigation.

Last updated on 11/10/2023

Switzerland

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

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

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

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

Last updated on 15/09/2022

Turkey

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

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

Last updated on 15/09/2022

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdeci*
at Hengeler Mueller

In principle, it is possible to conclude non-disclosure agreements with external consultants of the investigation or with employees involved in the investigation. However, regarding external lawyers, a non-disclosure agreement is not necessary since lawyers are already subject to professional confidentiality. Concerning employees, it is rare in Germany to conclude confidentiality agreements in connection with a workplace investigation.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

There is no legislation regarding NDAs, but there is a Bill before the legislature proposing to “restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination”. It is currently at the report stage. Whether it passes remains to be seen, but there has in recent times been strong criticism of the use of NDAs to cover up matters that ought to be fully investigated and dealt with in an organisation.

Settlement agreements, however they arise, may include confidentiality clauses which may, depending on the terms of the agreement, extend to the fact and substance of an investigation, but as in the UK an employee's right to make a protected disclosure or report a criminal offence cannot be waived by signing an NDA.

Last updated on 11/10/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*

at Bär & Karrer

In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

Last updated on 15/09/2022



Turkey

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

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

Last updated on 15/09/2022

14. When does privilege attach to investigation materials?



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

The legal situation regarding attorney-client privilege for investigation materials compiled by external advisors (in particular investigation reports) is unclear. In principle, there is no absolute protection against seizure by the public prosecutor in the relationship between client and lawyer. Such protection only exists in the relationship between the accused in a criminal proceeding and his criminal defence attorney.

In recent years, German courts have repeatedly issued different rulings on the question of whether investigation materials (at the company itself or a lawyer's office) may be seized. In 2018, the Federal Constitutional Court (BVerfG) ruled that the seizure of documents at the offices of an international law firm that is not based in Germany, and therefore can not invoke German constitutional rights, is lawful. However, the BVerfG did not comment on what would apply to seizures at law firms based in Germany.

For violations that could lead to the company itself being exposed to investigative proceedings at some point and possibly having to defend itself, there are, in our view, good arguments for investigation materials being subject to attorney-client privilege. Additionally, the lawyer's hand file, in which he usually keeps his notes on the case or minutes of conversations with his client, may also not be seized. In all other cases, under the current legal situation, there is a risk that the materials may be seized, even in the office of the company's lawyer. From a practical point of view, it is nevertheless advisable to label investigative materials, especially interview protocols and investigation reports, with a notice that they are confidential documents subject to attorney-client privilege and to store them not at the company's premises but in an attorney's office.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

It would be difficult to assert privilege over materials that relate to the investigation itself.

Privilege may arise before the instigation of an investigation where an employer may seek legal advice from their legal advisors over the initial complaint and appropriate next steps. Subject to the relevant tests being met, Legal Advice Privilege arises in respect of a confidential communication that takes place between a professionally qualified lawyer and a client. Who the client is will be of significant importance as they must be capable of giving instructions to their lawyer, on behalf of the employer. Caution should be exercised by employers if advice to "the client" is disseminated further within the business to other members of management. If such a scenario arises, then there is a risk that privilege may be waived and such material could be disclosable under a data subject access request. Litigation privilege arises with respect to confidential communications that take place between a lawyer or a client and a third party for the dominant purpose of preparing for litigation, whether existing or reasonably contemplated.

It is also prudent to consider whether an external investigator should have access to their own independent legal advisor, and the funding arrangements for such advice would have to be considered by the employer.

Last updated on 11/10/2023

Switzerland

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

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

Turkey

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

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

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

Generally, the employee is free to engage a lawyer at his own expense if he needs legal advice in connection with a workplace investigation. However, the employee does not have a right to consult a lawyer at the employer's expense or to have a lawyer present at an interview. Similarly, the employee is not entitled to be accompanied, for example, by a works council member, during an interview. The involvement of legal counsel may potentially inflate the investigation unnecessarily, making it longer and more expensive. However, it may be advisable from the employer's point of view to (proactively) allow legal representation (eg, to increase the employee's willingness to testify or to create trust) and even to bear the legal counsel's fees. Specifically, if the employee is already a defendant in criminal proceedings or runs the risk of incriminating himself, he should be allowed to be accompanied by a lawyer, otherwise he may be unwilling to cooperate.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

This depends on the nature of the investigation. If the complaint originates from an employee as a grievance, then the employee would have the right to representation during the investigation. Representation in this context is more akin to the right to be accompanied, as in the UK by either a colleague or trade union representative.

If the investigation is a fact-gathering investigation originating from the employer, then the employee would not have the right to be represented during the investigation. That right would apply only at any subsequent disciplinary hearing.

If the investigation is a fact-finding investigation as part of a disciplinary process originating from the employer, then the employee ought to be given the right to be represented at that investigation stage. Again the right is akin to the right to be accompanied. There was concern from employers that the right had been expanded to legal representation in disciplinary matters with the case of *McKelvey v Irish Rail*. However, the Supreme Court in that case clarified that the right to legal representation in disciplinary processes is only in exceptional circumstances.

Switzerland

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

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

Turkey

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

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

Last updated on 15/09/2022

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

The works council does not have a general right of co-determination on whether and in what way a workplace investigation is carried out. However, workplace investigations may trigger co-determination rights of the works council in specific cases, as outlined below. If co-determination rights come into consideration, the employer must inform the works council about the investigation to put the works council in a position to assess whether or not co-determination rights are affected.

In connection with workplace investigations, the works council may have a co-determination right in the following cases:

- If e-mail accounts and data are screened by using technical devices that are suitable to monitor the behaviour or performance of employees (section 87 paragraph 1 no. 6, BetrVG).
- If, for example, the employer instructs all or a large group of employees to participate in interviews, the co-determination right of the works council regarding the rules of operation of the establishment and the conduct of employees in the establishment (section 87 paragraph 1 no. 1, BetrVG) may be affected.
- If standardised questionnaires are used in employee interviews, provided they are used for a large group of interviewed employees (section 94, BetrVG).

If co-determination rights exist in the specific case, the works council has the right to co-determine the type and structure of the specific investigative measures used (ie, the relevant investigative measure cannot be carried out without the works council's consent). To avoid any conflicts, the employer should set up, together with the works council, general rules about workplace investigations well ahead of any investigation.

Trade unions have no right of co-determination in workplace investigations.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

This will depend on the agreement with the works council or trade union. The employee who is the respondent to the investigation may have views on their trade union being informed, aside from any agreement, which should be taken into account under GDPR provisions.

Last updated on 11/10/2023

Switzerland

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

In general, works councils and trade unions are not very common in Switzerland and there are no statutory rules that would provide a works council or trade union a right to be informed or involved in an ongoing internal investigation. However, respective obligations might be foreseen in an applicable collective bargaining agreement, internal regulations or similar.

Last updated on 15/09/2022

Turkey

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

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

Last updated on 15/09/2022

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

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

Generally, when employees may also use their devices for private purposes, the employer should ensure it allows its employees to tag their private data as "private". This tagging may facilitate the differentiation between business data (relevant for the investigation) and (non-usable) private data in the event of e-mail and electronic data screening.

In addition, the employer may, in appropriate cases, assure the employee that, if there is complete and truthful disclosure of facts to be clarified, the employer will refrain from imposing sanctions under labour and civil law (eg, a warning, termination of employment and the assertion of any claims for damages). In practice, assistance in finding a lawyer and the payment of legal fees is sometimes offered. However, such amnesty programmes are commonly only useful if there is a large number of cases that are particularly complex, poorly documented and difficult to resolve without amnesty offers.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

If an employee assistance programme is in place, an employee irrespective of their role in the investigation should be directed to the programme and encouraged to avail of the services. Investigations can become protracted and employees should be kept informed as to progress and what is required of them regarding participation. Regular checks of the health and well-being of employees should also be made. Even if such a programme is not in place, occasionally and depending on the issues giving rise to the investigation, it may be appropriate for the employer to cover the cost of counselling to a certain extent.

Last updated on 11/10/2023

Switzerland

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

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



Turkey

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

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

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

There are no specific rules if unrelated matters are revealed during the investigation. If, in the course of the workplace investigation, new facts are discovered, the same principles apply as for the original reason for the investigation and the employer should consider whether to extend the investigation to the new matter too.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

If an investigator finds other issues that are outside the scope of the terms of reference, these should not be ignored but equally should not be included as part of the investigation, as they are beyond the remit of the investigation that was established at the beginning. An investigator should identify the other matters that may require further action and report these to the employer separately so as not to conflate issues.

Last updated on 11/10/2023



Switzerland

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

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

Last updated on 15/09/2022



Turkey

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

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

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

As seen in question 6, the employee must participate in interviews requested by the employer under certain circumstances. Generally, the employee must provide truthful information even if it is incriminating.

The raising of a grievance by the employee does not directly affect the workplace investigation (ie, the investigation does not have to be stopped and the employee's obligation to provide truthful information continues). This may change, however, once the court decides that certain measures were conducted unlawfully and must, therefore, cease.

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

If the subject of the grievance relates to the subject of the investigation, the employee should be reassured that all the matters that they wish to raise concerning the matter under investigation will be dealt with in full as part of the investigation.

If the employee raises a grievance that is unrelated to the matter under investigation, then that can be dealt with concurrently, albeit by a separate investigator.

The initial investigation does not automatically need to be halted upon receipt of a grievance. Frequently, grievances are submitted in the hope that they derail or delay the original investigation. Careful consideration should be given as to the nature of the grievance and the appropriate course of action adopted.

Last updated on 11/10/2023

Switzerland

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

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

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

Last updated on 15/09/2022

Turkey

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

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

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdeci*
at Hengeler Mueller

Workplace investigations that do not require the presence or active cooperation of the employee may also start or continue during the employee's absence due to illness. If the employee's cooperation is required, for example for an interview, the employer can only instruct the employee to participate despite an existing illness if certain narrow conditions are met:

Regarding staff meetings at the company, the German Federal Labour Court has ruled that the employer can only instruct the employee to attend the staff meeting during illness if

- there is an urgent operational reason for doing so, which does not allow the instruction to be postponed until after the end of the incapacity to work; and
- the employee's presence at the company is urgently required and can be expected of him.

Similar rules are likely to apply to the employee's presence for workplace investigations.

Urgent operational reasons that cannot be postponed could exist, for example, if during the employee's absence due to illness, there is a risk that evidence will be lost (eg, where only the employee affected has access to certain files or data) or there is a risk of significant damage to the employer if workplace investigations are stopped until after the employee's return.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

If an employee goes off sick during the investigation, it is reasonable to adjourn the investigation until the employee is fit to return to work. Difficulties arise if it is a prolonged absence. The absence may necessitate a referral to an occupational health expert and it may be necessary to seek medical advice as to whether the employee can continue to participate in the investigation. It may be that reasonable accommodations should be considered to ensure that the employee can continue to participate. Such situations may impinge on the investigator's ability to conclude the investigation. In that instance, it would be prudent for the investigator to document all attempts to involve the employee in the investigation and to assess whether it can be concluded without the further involvement of the employee.

Last updated on 11/10/2023



Switzerland

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

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



Turkey

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

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

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdeci*
at Hengeler Mueller

In principle, workplace investigations and criminal or regulatory investigations are not dependent on each other and can therefore be conducted in parallel. German public prosecutors have an ambivalent view of internal investigations. On the one hand, they are to some extent sceptical about workplace investigations. They fear that evidence will be destroyed and facts manipulated. On the other hand, they often do not have the resources to conduct investigations as extensive as the companies do. In any event, due to the principle of official investigation that applies in Germany, the investigating public prosecutor's office will usually reassess the results of an internal investigation and conduct independent investigations.

Regarding whether internal investigations reports and material have to be shared with or can be seized by the public prosecutor, please see question 14.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Workplace investigations can originate from criminal investigations or proceedings. It may be that an employer only becomes aware of a matter through the involvement of the police (An Garda Síochána) or regulatory bodies.

If a criminal investigation is pending it can complicate a workplace investigation, but it will be specific to the nature of the complaint. Likewise, where a regulatory investigation is in scope, an employee may argue that any internal investigation should be put on hold, on the basis that it will harm any regulatory investigation. Such matters will be dealt with on a case-by-case basis as it may be some time before any regulation investigation commences, by which time the workplace investigation and any subsequent process may have been concluded.

Employers will also have to consider their reporting obligations to An Garda Síochána. If the matter relates to fraud, misuse of public money, bribery, corruption or money laundering, for example, reporting obligations arise under section 19 of the Criminal Justice Act 2011. A failure to report information that an employer knows or believes might be of material assistance in preventing the commission of an offence, or assisting in the apprehension, prosecution or conviction of another person may be guilty of an offence.

Also, the Irish Central Bank's (Individual Accountability Framework) Act 2023 (the Act) was signed into law on 9 March 2023 but has not yet been enacted. The framework provides scope for a senior executive accountability regime, which will initially only apply to banks, insurers and certain MiFID firms. However, its application may be extended soon. The Act forces employers to engage in disciplinary action against those who may have breached specific "Conduct Standards".

Last updated on 11/10/2023

Switzerland

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

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

Last updated on 15/09/2022

Turkey

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

If the issues being examined during an investigation are also subject to parallel criminal or regulatory

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

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

The employer has no general obligation to proactively inform the employee about the outcome of an investigation. However, if personal data was collected, the employee has the right to request certain information: the purpose of the data collection, type of data, recipients of the data, the planned storage period of the data, his right to have the data corrected or deleted, his right to complain to a supervisory authority, and information on the source of the data.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

The employee whose actions are the subject of the investigation must be advised of the outcome of the investigation. They are usually provided with a copy of the investigator's report.

Last updated on 11/10/2023



Switzerland

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

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



Turkey

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

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

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdeci*
at Hengeler Mueller

Generally, general data protection regulations apply. This means that, after the investigation, the information described in question 22 must only be provided if the employee requests it.

Whether, in the context of such a request, the full report needs to be shared is disputed in Germany. Some legal scholars and labour courts argue that a summary of the content of the report is sufficient. Others state that the employee should be presented with the full report, whereby passages that do not concern him should be redacted. In practice, it is highly uncommon to share the full report with the employee.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

The investigation report should be shared in full, unless there is some specific reason for not doing so. One example is where there is a possibility of a criminal investigation; in that instance, it may be appropriate

not to share the full report. Occasionally, there may be several respondents involved in the complaint, and each respondent may only be entitled to the report that relates to them.

Last updated on 11/10/2023

Switzerland

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

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

Turkey

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

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

Last updated on 15/09/2022

24. What next steps are available to the employer?

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

Depending on the results of the investigation, different steps may have to be taken by the employer. Specifically, the following should be considered:

- in certain cases, there may be an obligation (or at least good reason) to share the results of the workplace investigation with the authorities (see question 25);
- filing of a criminal complaint against the employee;
- disciplinary measures against the employee such as a warning, ordinary termination or termination for cause;
- assessing and asserting claims for damages against the employee;
- offering compliance training to the relevant employees or introducing additional measures to prevent further violations;
- if there is a risk that the company itself is exposed to investigative proceedings at some point and may have to defend itself, investigation materials should be stored at the company's external attorney's office; and
- depending on the individual circumstances of the case and to mitigate potential reputational damage, proactively informing the public (eg, by issuing a press release) may be beneficial.

Last updated on 15/09/2022

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

The investigator will usually set out recommendations within their report. It will then be up to the employer to act on those recommendations and to accept or reject the findings (if it were a fact-finding investigation). If, for example, a recommendation is made that the matter should proceed to a disciplinary hearing, the employer should then arrange such a hearing and nominate an impartial member of management to carry out the disciplinary hearing. In some instances, recommendations are made by investigators to provide training or update policies and such recommendations should be acted upon without delay. It may also be appropriate to notify a specific regulator of the outcome of the investigation.

Last updated on 11/10/2023

Switzerland

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

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

Turkey

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

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

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

Last updated on 15/09/2022

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?



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

At the end of the workplace investigation, the results are presented to the company's management bodies so that they can make a decision. This may be a mere summary of the facts, or it may contain a legal assessment and recommendation for action.

There is no general obligation to report compliance violations to the police or public prosecutor's office. For some violations, there are statutory disclosure requirements. For example, data protection violations must be reported to the responsible supervisory authority (article 33 and 34, DSGVO), violations in connection with money laundering must be reported to the Central Office for Financial Transaction Investigations (section 43, Anti-Money Laundering Act), unlawful claiming of subventions must be disclosed to the subsidy-providing authority (section 3, Subventions Act), and incorrect information in the tax declaration must be reported to the tax authority (section 153, Tax Code). Additionally, in listed companies, criminal acts may constitute insider information in individual cases, and this must be disclosed within the framework of ad hoc publicity following market abuse regulations.

Also, there may be cases where reporting to the authorities should be considered for corporate policy and tactical reasons (eg, to avoid or mitigate negative consequences for the business).

Pursuant to section 17 paragraph 2, HinSchG, feedback will need to be provided to the whistleblower within three months of confirmation of receipt of the report or, if the receipt has not been confirmed to the whistleblower, within three months and seven days after receipt of the report. This includes the communication of planned and already taken follow-up measures as well as their reasons. Feedback to the whistleblower may only be provided to the extent that it does not affect the workplace investigation and does not prejudice the rights of the persons who are the subject of the report or who are named in the report.

For the question of whether internal investigations reports and material need to be shared with or can be seized by the public prosecutor, please see question 14.

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Depending on the nature of the subject matter of the investigation, it may be appropriate to notify the Garda Síochána or a specific government body such as Revenue. Also, if the employee occupies a regulated position, it may be necessary to inform the relevant regulator. Again, compliance with GDPR obligations should be borne in mind.

Last updated on 11/10/2023

Switzerland

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

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

Turkey

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

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

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

If there is no special statutory storage period (which is the case for investigative reports and findings), personal data may only be stored for as long as is necessary for the purposes for which they are collected. As soon as the data is no longer required, it must be deleted. In connection with workplace investigations, the question arises as to how this obligation to delete personal data relates to the company's corporate interests. From the company's perspective, there may well be legitimate interests that speak in favour of retaining existing data for as long as possible. Under the data protection regulations of the DSGVO and the BDSG, data can be stored for as long as it is required for the assertion, exercise or defence of (civil) legal claims. This means that the data can, in any event, be saved at least as long as any measures related to the workplace investigation have not yet been completed and any legal disputes have not yet been concluded.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Irrespective of the outcome of the investigation, the fact that an employee was subject to an investigation is not the key issue. The key concern is whether any further action was taken as a result of the investigation. If a disciplinary process ensued, then it is the outcome of that disciplinary record and any subsequent appeal that would or would not be noted on an employee's record. If a disciplinary sanction were imposed then the length of time the sanction remains on the employee's record would depend on what is specified in the disciplinary policy.

Last updated on 11/10/2023



Switzerland

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

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



Turkey

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

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

Last updated on 15/09/2022

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



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

Different consequences may result from mistakes made by the employer (or its advisors) in the course of the workplace investigation. For example, if the employer has violated the data protection provisions of the DSGVO or BDSG, this may result in fines. This may also result in claims for damages by the employee. The employee may also have a claim for damages if it turns out that the suspicion of misconduct on the part of the employee is not confirmed and the employer has arbitrarily conducted workplace investigations without sufficient cause.

Last updated on 15/09/2022



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

A failure to follow fair procedures in the investigation can have significant consequences.

Although the exception rather than the rule, an employee could challenge the investigation through injunctive proceedings if there is a breach of fair procedures. Such action would be taken before the High Court. Injunction proceedings may be brought while the investigation is ongoing, or just before its conclusion to prevent publication of a report making specific findings against an employee. A successful injunction may curtail any subsequent attempt to investigate the matter as allegations of penalisation, prejudice and delay may arise.

Errors during the investigation can also give rise to a complaint of constructive dismissal, with allegations that flaws in the procedure have fundamentally breached the implied term of mutual trust and confidence.

A flawed investigation can also undermine any disciplinary process and sanction that is imposed as a result. This commonly occurs when an employee has been dismissed following a disciplinary process launched on foot of the investigation. While dismissal may be an appropriate sanction, the dismissal can still be found to be unfair if there is a failure to follow fair procedures. An employee may challenge their dismissal before the WRC and the employer should be alive to not only an unfair dismissal complaint, but allegations of discrimination and penalisation.

Overall, to carry out a successful workplace investigation, an employer should consider taking advice at the earliest opportunity to ensure that the investigation can withstand challenges.

Last updated on 11/10/2023

Switzerland

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

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

Turkey

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

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

Last updated on 15/09/2022

Contributors

Germany

Hendrik Bockenheimer
Susanne Walzer
Musa Müjdecı
Hengeler Mueller

Ireland

Bláthnaid Evans
Mary Gavin
Ogier

Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer

Turkey

Elvan Aziz
Gülce Saydam Pehlivan
Emre Kotil
Osman Pepeoğlu

www.internationalemploymentlawyer.com