

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

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

France

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

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

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Germany

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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.

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Switzerland

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

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

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

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