

# Workplace Investigations

## Contributing Editors

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

### Germany

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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.

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### Switzerland

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

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## 20. What if the employee under investigation goes off

# sick during the investigation?



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

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

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<sup>[1]</sup> 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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