

Workplace Investigations

Contributing Editors

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

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

Germany

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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.

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Switzerland

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It is possible to suspend an employee during a workplace investigation.^[1] While there are no limits on

duration, the employee will remain entitled to full pay during this time.

[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 181.

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



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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.

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Switzerland

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As a result of the employer's duty of care (article 328, Swiss Code of Obligations), employees under investigation have certain procedural rights. These include, in principle, the right of the accused to be heard. In this context, the accused has the right to be informed at the beginning of the questioning about the subject of the investigation and at least the main allegations and they must be allowed to share their view and provide exculpatory evidence.[1] The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.[2]

Covert investigations in which employees are involved in informal or even private conversations to induce them to provide statements are not compatible with the data-processing principles of good faith and the requirement of recognisability, according to article 4 of the Swiss Federal Act on Data Protection.[3]

Also, rights to information arise from the Swiss Federal Act on Data Protection. In principle, the right to information (article 8, Swiss Federal Act on Data Protection) is linked to a corresponding request for information by the concerned person and the existence of data collection within the meaning of article 3 (lit. g), Swiss Federal Act on Data Protection. Insofar as the documents from the internal investigation

recognisably relate to a specific person, there is in principle a right to information concerning these documents. Subject to certain conditions, the right to information may be denied, restricted or postponed by law (article 9 paragraph 1, Swiss Federal Act on Data Protection). For example, such documents and reports may also affect the confidentiality and protection interests of third parties, such as other employees. Based on the employer's duty of care (article 328, Swiss Code of Obligations), the employer is required to protect them by taking appropriate measures (eg, by making appropriate redactions before handing out copies of the respective documents (article 9 paragraph 1 (lit. b), Swiss Federal Act on Data Protection)).^[4] Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9 paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

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

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

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

[4] Claudia Götz Staehelin, Unternehmensinterne Untersuchungen, 2019, p. 37.

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