

Workplace Investigations

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

Germany

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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).

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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

14. When does privilege attach to investigation materials?

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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

Switzerland

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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

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