

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
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## 11. What information must the employee under investigation be given about the allegations against them?

### Germany

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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.<sup>[1]</sup> The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.<sup>[2]</sup>

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.<sup>[3]</sup>

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)).<sup>[4]</sup> 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).

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



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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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[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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