

Workplace Investigations

Contributing Editors

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14. When does privilege attach to investigation materials?

Germany

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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

16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?



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The works council does not have a general right of co-determination on whether and in what way a workplace investigation is carried out. However, workplace investigations may trigger co-determination rights of the works council in specific cases, as outlined below. If co-determination rights come into consideration, the employer must inform the works council about the investigation to put the works council in a position to assess whether or not co-determination rights are affected.

In connection with workplace investigations, the works council may have a co-determination right in the following cases:

- If e-mail accounts and data are screened by using technical devices that are suitable to monitor the behaviour or performance of employees (section 87 paragraph 1 no. 6, BetrVG).
- If, for example, the employer instructs all or a large group of employees to participate in interviews, the co-determination right of the works council regarding the rules of operation of the establishment and the conduct of employees in the establishment (section 87 paragraph 1 no. 1, BetrVG) may be affected.
- If standardised questionnaires are used in employee interviews, provided they are used for a large group of interviewed employees (section 94, BetrVG).

If co-determination rights exist in the specific case, the works council has the right to co-determine the type and structure of the specific investigative measures used (ie, the relevant investigative measure cannot be carried out without the works council's consent). To avoid any conflicts, the employer should set up, together with the works council, general rules about workplace investigations well ahead of any investigation.

Trade unions have no right of co-determination in workplace investigations.

Switzerland

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In general, works councils and trade unions are not very common in Switzerland and there are no statutory rules that would provide a works council or trade union a right to be informed or involved in an ongoing internal investigation. However, respective obligations might be foreseen in an applicable collective bargaining agreement, internal regulations or similar.

Last updated on 15/09/2022

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