

Workplace Investigations

Contributing Editors

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

17. What other support can employees involved in the investigation be given?

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdeci*
at Hengeler Mueller

Generally, when employees may also use their devices for private purposes, the employer should ensure it allows its employees to tag their private data as "private". This tagging may facilitate the differentiation between business data (relevant for the investigation) and (non-usable) private data in the event of e-mail and electronic data screening.

In addition, the employer may, in appropriate cases, assure the employee that, if there is complete and truthful disclosure of facts to be clarified, the employer will refrain from imposing sanctions under labour and civil law (eg, a warning, termination of employment and the assertion of any claims for damages). In practice, assistance in finding a lawyer and the payment of legal fees is sometimes offered. However, such amnesty programmes are commonly only useful if there is a large number of cases that are particularly complex, poorly documented and difficult to resolve without amnesty offers.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The employer does not generally need to provide specific support for employees that are subject to an internal investigation. The employer may, however, allow concerned employees to be accompanied by a trusted third party such as family members or friends.^[1] These third parties will need to sign separate non-disclosure agreements before being involved in the internal investigation.

In addition, a company may appoint a so-called lawyer of confidence who has been approved by the employer and is thus subject to professional secrecy. This lawyer will not be involved in the internal investigation but may look after the concerned employees and give them confidential advice as well as inform them about their rights and obligations arising from the employment relationship.^[2]

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

[2] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern, 2021, p. 133.

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26. How long should the outcome of the investigation remain on the employee's record?



Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

If there is no special statutory storage period (which is the case for investigative reports and findings), personal data may only be stored for as long as is necessary for the purposes for which they are collected. As soon as the data is no longer required, it must be deleted. In connection with workplace investigations, the question arises as to how this obligation to delete personal data relates to the company's corporate interests. From the company's perspective, there may well be legitimate interests that speak in favour of retaining existing data for as long as possible. Under the data protection regulations of the DSGVO and the BDSG, data can be stored for as long as it is required for the assertion, exercise or defence of (civil) legal claims. This means that the data can, in any event, be saved at least as long as any measures related to the workplace investigation have not yet been completed and any legal disputes have not yet been concluded.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

From an employment law point of view, there is no statute of limitations on the employee's violations. Based on the specific circumstances (eg, damage incurred, type of violation, basis of trust or the position of the employee), a decision must be made as to the extent to which the outcome should remain on the record.

From a data protection point of view, only data that is in the interest of the employee (eg, to issue a reference letter) may be retained during the employment relationship. In principle, stored data must be deleted after the termination of the employment relationship. Longer retention may be justified if rights are still to be safeguarded or obligations are to be fulfilled in the future (eg, data needed regarding foreseeable legal proceedings, data required to issue a reference letter or data in relation to a non-competition clause).^[1]

[1] Wolfgang Portmann/Isabelle Wildhaber, Schweizerisches Arbeitsrecht, 4. Edition, Zurich/St. Gallen 2020, N 473.

Contributors



Germany

Hendrik Bockenheimer

Susanne Walzer

Musa Müjdecı

Hengeler Mueller



Switzerland

Laura Widmer

Sandra Schaffner

Bär & Karrer