

Workplace Investigations

Contributing Editors

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01. What legislation, guidance and/or policies govern a workplace investigation?

Germany

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There are no specific legislative requirements for workplace investigations in Germany. In 2020, the Federal Ministry of Justice presented a draft bill with regulations on internal investigations and, in particular, employee interviews. However, this law failed to pass under the previous government. The current government has announced it will take up this matter again and plans to create a precise legal framework for internal investigations. Details, timing and content remain to be seen.

Nevertheless, workplace investigations do not take place in a "lawless space". They must comply with the provisions of employment and data protection law. Further, criminal and corporate law aspects can play a role. Moreover, works council information and co-determination rights may have to be taken into account.

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Switzerland

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There is no specific legal regulation for internal investigations in Switzerland. The legal framework is derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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02. How is a workplace investigation usually

commenced?



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Typical triggers for a workplace investigation may be internal hints (eg, from employees), internal audits, compliance or the legal department. However, investigations by the public prosecutor or other authorities can also lead to a workplace investigation.

There are no strict guidelines for the course of the investigation. The measures to be taken and the sequence in which they will be carried out to clarify the facts must be decided on a case-by-case basis. However, the first step should be to secure evidence. All relevant documents and records (eg, e-mails, hard disks, text messages, data carriers, copies) should be collected and employees may be interviewed. The second step should be to evaluate the evidence and the third step is to decide how to deal with the results (eg, whether any disciplinary measures should be taken or the intended procedures should be adjusted).

Irrespective of how a workplace investigation is commenced, when it comes to severe breaches of duty by an employee, a two-week exclusion period for issuing a termination for cause must be observed at all stages. This two-week period starts when the employer becomes aware of the relevant facts but is suspended as long as the employer is still investigating and collecting information, provided that the investigation is carried out swiftly.

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Switzerland

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Internal investigations are usually initiated after reports about possible violations of the employer's code of conduct, applicable laws or regulations have been submitted by employees to their superiors, the human resources department or designated internal reporting systems such as hotlines (including whistleblowing hotlines).

For an internal investigation to be initiated, there must be a reasonable suspicion (grounds).^[1] If no such grounds exist, the employer must ask the informant for further or more specific information. If no grounds for reasonable suspicion exist, the case must be closed. If grounds for reasonable suspicion exist, the appropriate investigative steps can be initiated by a formal investigation request from the company management.^[2]

^[1] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 21.

^[2] Klaus Moosmayer, *Compliance, Praxisleitfaden für Unternehmen*, 2. A. München 2015, N 314.

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03. Can an employee be suspended during a

workplace investigation? Are there any conditions on suspension (eg, pay, duration)?



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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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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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04. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?



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It is up to the company to decide who should carry out the workplace investigation and individual investigative steps. If their staff is used, the question arises of which person or department (compliance, legal, internal audit, HR or management) should take the lead. The answer to this question may depend on various factors such as the number of employees affected by the workplace investigation and the nature of the alleged misconduct. In any event, due to various employment law and data protection issues, the HR department and the legal department should be involved.

Further, it may make sense to bring in external advisors to lead the investigation together with an internal investigation team of the company. The engagement of an external investigation team can also be advantageous concerning the two-week exclusion period for termination for cause. This period does not start to run as long as the external advisors are investigating, but only when the persons authorised to terminate employment receive the investigation report.

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The examinations can be carried out internally by designated internal employees, by external specialists, or by a combination thereof. The addition of external advisors is particularly recommended if the allegations are against an employee of a high hierarchical level^[1], if the allegations concerned are quite substantive and, in any case, where an increased degree of independence is sought.

^[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 18.

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05. Can the employee under investigation bring legal action to stop the investigation?

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There is no general legal remedy against the conduct of the investigation itself. However, if individual measures are carried out in violation of the law (eg, data protection rules), the employee can take legal action against the specific measure through an interim injunction. In addition, the employee has the right to complain to the works council and ask for the works council's support if he feels that the employer has discriminated against him, has treated him unfairly, or that he has been adversely affected in any other way (section 84 paragraph 1 s 2, German Works Constitution Act (BetrVG)).

Additionally, the works council has the right to take legal action against investigative measures that were carried out in violation of its co-determination rights (see question 16).

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The accused could theoretically request a court to stop the investigation, for instance, by arguing that there is no reason for the investigation and that the investigation infringes the employee's personality rights. However, if the employer can prove that there were grounds for reasonable suspicion and is conducting the investigation properly, it is unlikely that such a request would be successful.

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06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?

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Since there is no mandatory law (yet) that provides a framework for workplace investigation interviews, there are also no special protective regulations for employees acting as witnesses.

Employees have a contractual duty to participate in interviews – be it as a suspect or as a witness – as part of workplace investigations. The employee must provide truthful information based on his duty of loyalty if:

- the questions relate to his area of work;
- the employer has an interest worthy of protection in obtaining the information; and
- the requested information does not represent an excessive burden for the employee.

Whether such a burden can be assumed when the employee must make statements by which he may incriminate himself is disputed in German case law and legal literature. The German Federal Labour Court has not yet decided on this question. Since an internal workplace investigation interview is an interview under private law and not under criminal law, there are, in our view, good arguments that the employee must also make a true statement even if he incriminates himself, provided his area of work is concerned. However, some labour courts assume that in these cases such a statement could not be used in criminal proceedings.

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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the

employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.^[1] However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal investigation).^[2]

^[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

^[2] Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

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



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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.

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08. Can the employer search employees' possessions or files as part of an investigation?



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Files and documents that are purely business-related – whether in physical or digital form – may, in principle, be inspected by the employer without restriction. The employee has no right to refuse inspection.

When searching business laptops, computers, phones and e-mail accounts, a distinction must be made as to whether private use is permitted (or at least tolerated) or not: if the employee is allowed to use the items exclusively for business purposes, the employer may monitor and control them. If private use is permitted, the employee's right to privacy must be observed for private files, as must the protection of the secrecy of correspondence. Accordingly, the employer must avoid accessing private documents, files and e-mails. However, a review of private documents, files and e-mails may be permissible in the event of

particularly serious violations if the employer's interest in the review outweighs the employee's interest in safeguarding his right to privacy. Generally, employers should allow private use of electronic devices only if employees have previously consented to the terms of use (including searches in certain cases).

A search of the employee's workplace by the employer is, in principle, permissible. However, a search of personal items (eg, bags, clothes, personal mobile phone) is generally only permissible with the employee's consent. Similarly to the review of digital personal data, a search of personal items may be permitted, however, in the event of particularly serious violations if the employer's interest in the search outweighs the employee's right to privacy.

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The basic rule is that the employer may not search private data during internal investigations.

If there is a strong suspicion of criminal conduct on the part of the employee and a sufficiently strong justification exists, a search of private data may be justified.^[1] The factual connection with the employment relationship is given, for example, in the case of a criminal act committed during working hours or using workplace infrastructure.^[2]

^[1] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168.

^[2] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168 et seq.

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09. What additional considerations apply when the investigation involves whistleblowing?



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In 2023, Germany has implemented the EU Whistleblowing Directive into national law with the German Whistleblower Protection Act (HinSchG).

The German Whistleblower Protection Act provides that companies with at least 50 employees must establish internal reporting channels as further set out in the law. Among other things, the confidentiality of the whistleblower as well as of the individuals affected by the report must be protected.

Further, whistleblowers must be protected from negative consequences that may arise from their reports. If the employment of a whistleblower were terminated or if the whistleblower were to be denied promotion after reporting a violation, the employer would have to prove that this was not related to the whistleblowing but was based on justified reasons.

Employers should familiarise themselves with the provisions of the new law.

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If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

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10. What confidentiality obligations apply during an investigation?

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Depending on the subject of the investigation and the severity and significance of the suspected violation, employees who are involved in the workplace investigation may already have to maintain confidentiality based on their contractual duties. The prerequisite for this is that the employer has a legitimate interest in maintaining confidentiality. Criminal acts are not subject to confidentiality, but there is also no general obligation for the employee to report or disclose a criminal act to the authorities or the public prosecutor. However, reporting to the competent authorities may be required in certain cases (see question 25).

Lawyers are bound by professional confidentiality and are generally not allowed to provide information about any information they receive from their clients. An exception exists, for example, if the lawyer must provide information to defend himself in court proceedings. There is also no absolute protection against the seizure of documents at an attorney's office (see question 14).

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Besides the employee's duty of performance (article 319, Swiss Code of Obligations), the employment relationship is defined by the employer's duty of care (article 328, Swiss Code of Obligations) and the employee's duty of loyalty (article 321a, Swiss Code of Obligations). Ancillary duties can be derived from the two duties, which are of importance for the confidentiality of an internal investigation.[\[1\]](#)

In principle, the employer must respect and protect the personality (including confidentiality and privacy) and integrity of the employee (article 328 paragraph 1, Swiss Code of Obligations) and take appropriate measures to protect the employee. Because of the danger of pre-judgment or damage to reputation as well

as other adverse consequences, the employer must conduct an internal investigation discreetly and objectively. The limits of the duty of care are found in the legitimate self-interest of the employer.^[2]

In return for the employer's duty of care, employees must comply with their duty of loyalty and safeguard the employer's legitimate interests. In connection with an internal investigation, employees must therefore keep the conduct of an investigation confidential. Additionally, employees must keep confidential and not disclose to any third party any facts that they have acquired in the course of the employment relationship, and which are neither obvious nor publicly accessible.^[3]

[1] Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

[2] Claudia Fritsche, *Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute*, p. 202.

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

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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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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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12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?



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There is no general obligation on the part of the employer to disclose to the employee concerned the identity of the complainant, witnesses or other sources of information during the workplace investigation.

However, as described in question 11, the employee must be sufficiently informed of the allegations before a termination based on suspicion of wrongdoing is issued. This may also require disclosing the complainant's or witnesses' identity or other sources of information. In addition, the employer would have the burden of proof in the context of a legal dispute (eg, termination protection proceedings or proceedings about the legality of certain investigation measures) and may have to name witnesses and disclose sources of information.

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As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused' interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person implicated by the information provided.^[1]

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

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13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?



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In principle, it is possible to conclude non-disclosure agreements with external consultants of the investigation or with employees involved in the investigation. However, regarding external lawyers, a non-disclosure agreement is not necessary since lawyers are already subject to professional confidentiality. Concerning employees, it is rare in Germany to conclude confidentiality agreements in connection with a workplace investigation.

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In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

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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.

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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.

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15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?



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Generally, the employee is free to engage a lawyer at his own expense if he needs legal advice in connection with a workplace investigation. However, the employee does not have a right to consult a lawyer at the employer's expense or to have a lawyer present at an interview. Similarly, the employee is not entitled to be accompanied, for example, by a works council member, during an interview. The involvement of legal counsel may potentially inflate the investigation unnecessarily, making it longer and more expensive. However, it may be advisable from the employer's point of view to (proactively) allow legal representation (eg, to increase the employee's willingness to testify or to create trust) and even to bear the legal counsel's fees. Specifically, if the employee is already a defendant in criminal proceedings or runs the risk of incriminating himself, he should be allowed to be accompanied by a lawyer, otherwise he may be unwilling to cooperate.

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In the case of an employee involved in an internal investigation, a distinction must be made as to whether the employee is acting purely as an informant or whether there are conflicting interests between the company and the employee involved. If the employee is acting purely as an informant, the employee has, in principle, no right to be accompanied by their own legal representative.[1]

However, if there are conflicting interests between the company and the employee involved, when the employee is accused of any misconduct, the employee must be able to be accompanied by their own legal representative. For example, if the employee's conduct might potentially constitute a criminal offence, the involvement of a legal representative must be permitted.^[2] Failure to allow an accused person to be accompanied by a legal representative during an internal investigation, even though the facts in question are relevant to criminal law, raises the question of the admissibility of statements made in a subsequent criminal proceeding. The principles of the Swiss Criminal Procedure Code cannot be undermined by alternatively collecting evidence in civil proceedings and thus circumventing the stricter rules applicable in criminal proceedings.^[3]

In general, it is advisable to allow the involvement of a legal representative to increase the willingness of the employee involved to cooperate.

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

[2] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 59.

[3] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 392; Niklaus Ruckstuhl, BSK-StPO, Art. 158 StPO N 36.

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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.

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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.

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



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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

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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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18. What if unrelated matters are revealed as a result of the investigation?



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There are no specific rules if unrelated matters are revealed during the investigation. If, in the course of the workplace investigation, new facts are discovered, the same principles apply as for the original reason for the investigation and the employer should consider whether to extend the investigation to the new matter too.

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Switzerland

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There are no regulations in this regard in the Swiss employment law framework. However, in criminal proceedings, the rules regarding accidental findings apply (eg, article 243, Swiss Criminal Procedure Code for searches and examinations or article 278, Swiss Criminal Procedure Code for surveillance of post and telecommunications). In principle, accidental findings are usable, with the caveat of general prohibitions on the use of evidence.

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19. What if the employee under investigation raises a grievance during the investigation?



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As seen in question 6, the employee must participate in interviews requested by the employer under certain circumstances. Generally, the employee must provide truthful information even if it is incriminating.

The raising of a grievance by the employee does not directly affect the workplace investigation (ie, the investigation does not have to be stopped and the employee's obligation to provide truthful information continues). This may change, however, once the court decides that certain measures were conducted unlawfully and must, therefore, cease.

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Switzerland

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In the context of private internal investigations, grievances initially raised by the employee do not usually have an impact on the investigation.

However, if the employer terminates the employment contract due to a justified legal complaint raised by an employee, a court might consider the termination to be abusive and award the employee compensation in an amount to be determined by the court but not exceeding six months' pay for the employee (article 336 paragraph 1 (lit. b) and article 337c paragraph 3, Swiss Code of Obligations). Furthermore, a termination by the employer may be challenged if it takes place without good cause following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee (article 10, Federal Act on Gender Equality).

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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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The time spent on the internal investigation by the employee should be counted as working time^[1]. 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).

^[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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21. How do you handle a parallel criminal and/or regulatory investigation?

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In principle, workplace investigations and criminal or regulatory investigations are not dependent on each other and can therefore be conducted in parallel. German public prosecutors have an ambivalent view of internal investigations. On the one hand, they are to some extent sceptical about workplace investigations. They fear that evidence will be destroyed and facts manipulated. On the other hand, they often do not have the resources to conduct investigations as extensive as the companies do. In any event, due to the principle of official investigation that applies in Germany, the investigating public prosecutor's office will usually reassess the results of an internal investigation and conduct independent investigations.

Regarding whether internal investigations reports and material have to be shared with or can be seized by the public prosecutor, please see question 14.

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Switzerland

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The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

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22. What must the employee under investigation be told about the outcome of an investigation?



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The employer has no general obligation to proactively inform the employee about the outcome of an investigation. However, if personal data was collected, the employee has the right to request certain information: the purpose of the data collection, type of data, recipients of the data, the planned storage period of the data, his right to have the data corrected or deleted, his right to complain to a supervisory authority, and information on the source of the data.

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Switzerland

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Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.^[1] In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.^[2]

^[1] Arbeitsgericht Zürich, Entscheide 2013 No. 16; Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 393 et seq.

^[2] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 394.

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23. Should the investigation report be shared in full, or just the findings?



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Generally, general data protection regulations apply. This means that, after the investigation, the information described in question 22 must only be provided if the employee requests it.

Whether, in the context of such a request, the full report needs to be shared is disputed in Germany. Some legal scholars and labour courts argue that a summary of the content of the report is sufficient. Others state that the employee should be presented with the full report, whereby passages that do not concern him should be redacted. In practice, it is highly uncommon to share the full report with the employee.

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Switzerland

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In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).^[1] Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.^[2]

^[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, in: *HR Today*, to be found on: <Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

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24. What next steps are available to the employer?



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Depending on the results of the investigation, different steps may have to be taken by the employer.

Specifically, the following should be considered:

- in certain cases, there may be an obligation (or at least good reason) to share the results of the workplace investigation with the authorities (see question 25);
- filing of a criminal complaint against the employee;
- disciplinary measures against the employee such as a warning, ordinary termination or termination for cause;
- assessing and asserting claims for damages against the employee;
- offering compliance training to the relevant employees or introducing additional measures to prevent further violations;
- if there is a risk that the company itself is exposed to investigative proceedings at some point and may have to defend itself, investigation materials should be stored at the company's external attorney's office; and
- depending on the individual circumstances of the case and to mitigate potential reputational damage, proactively informing the public (eg, by issuing a press release) may be beneficial.

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Switzerland

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If the investigation uncovers misconduct, the question arises as to what steps should be taken. Of course, the severity of the misconduct and the damage caused play a significant role. Furthermore, it must be noted that the cooperation of the employee concerned may be of decisive importance for the outcome of the investigation. The possibilities are numerous, ranging, for example, from preventive measures to criminal complaints.^[1]

If individual disciplinary actions are necessary, these may range from warnings to ordinary or immediate termination of employment.

^[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 180 et seq.

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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?

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At the end of the workplace investigation, the results are presented to the company's management bodies so that they can make a decision. This may be a mere summary of the facts, or it may contain a legal assessment and recommendation for action.

There is no general obligation to report compliance violations to the police or public prosecutor's office. For some violations, there are statutory disclosure requirements. For example, data protection violations must be reported to the responsible supervisory authority (article 33 and 34, DSGVO), violations in connection with money laundering must be reported to the Central Office for Financial Transaction Investigations (section 43, Anti-Money Laundering Act), unlawful claiming of subventions must be disclosed to the subsidy-providing authority (section 3, Subventions Act), and incorrect information in the tax declaration must be reported to the tax authority (section 153, Tax Code). Additionally, in listed companies, criminal acts may constitute insider information in individual cases, and this must be disclosed within the framework of ad hoc publicity following market abuse regulations.

Also, there may be cases where reporting to the authorities should be considered for corporate policy and tactical reasons (eg, to avoid or mitigate negative consequences for the business).

Pursuant to section 17 paragraph 2, HinSchG, feedback will need to be provided to the whistleblower within three months of confirmation of receipt of the report or, if the receipt has not been confirmed to the whistleblower, within three months and seven days after receipt of the report. This includes the communication of planned and already taken follow-up measures as well as their reasons. Feedback to the whistleblower may only be provided to the extent that it does not affect the workplace investigation and does not prejudice the rights of the persons who are the subject of the report or who are named in the report.

For the question of whether internal investigations reports and material need to be shared with or can be seized by the public prosecutor, please see question 14.

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The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.^[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.^[2]

^[1] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 123.

^[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 102 et seq.

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

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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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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.

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27. What legal exposure could the employer face for errors during the investigation?

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Different consequences may result from mistakes made by the employer (or its advisors) in the course of

the workplace investigation. For example, if the employer has violated the data protection provisions of the DSGVO or BDSG, this may result in fines. This may also result in claims for damages by the employee. The employee may also have a claim for damages if it turns out that the suspicion of misconduct on the part of the employee is not confirmed and the employer has arbitrarily conducted workplace investigations without sufficient cause.

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Switzerland

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As there are no specific regulations for internal investigations, the usual legal framework within which the employer must act towards the employee derives from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights.

But, for example, unwarranted surveillance could conceivably result in criminal liability (article 179 et seq, Swiss Criminal Code) for violations of the employee's privacy. Furthermore, errors made by the employer could have an impact on any later criminal proceedings (eg, in the form of prohibitions on the use of evidence).[1]

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual's interest in not using the evidence and in establishing the truth.[2] The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.[3] Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to criminal proceedings, to examine whether the evidence could also have been obtained by legal means.[4]

Unlawful action by the employer may also have consequences on future criminal proceedings: The prohibitions on exploitation (article 140 et seq, Swiss Criminal Procedure Code) apply a priori only to evidence obtained directly from public authorities. Evidence obtained unlawfully by private persons (ie, the employer) may also be used if it could have been lawfully obtained by the authority and if the interest in establishing the truth outweighs the interest of the individual in not using the evidence.[5] Art. 140 paragraph 1 Swiss Criminal Procure Code remains reserved: Evidence obtained in violation of Art. 140 paragraph 1 Swiss Criminal Procure Code is subject to an absolute ban on the use of evidence (e.g. evidence obtained under the use of torture[6]).[7]

[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), *Zivilprozessrecht*, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[4] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), *Zivilprozessrecht*, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

[6] Jérôme Benedict/Jean Treccani, CR-CPP Art. 140 N. 5 and Art. 141 N. 3.

[7] Yvan Jeanneret/André Kuhn, *Précis de procédure pénale*, 2nd Edition, Berne 2018, N 9011.

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