

Workplace Investigations

Contributing Editors

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

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

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

There is no specific legislation regarding a workplace investigation. In general, an employer has the right to investigate incidents at the workplace based on their authority over employees. However, the investigative powers of the employer are among others limited by the general right to privacy, which is also enshrined in Collective Bargaining Agreement No. 81 of 26 April 2002 to protect the privacy of employees concerning the control of electronic online data. If there are official complaints by employees due to sexual harassment, bullying or violence at work, well-being legislation provides a specific procedure. Also, upcoming whistleblower rules include some specifications for an investigation, but at the time of publication these are not yet final (we refer to is in more detail below). The information below is only valid for workplace investigations in the private sector. The public sector has a set of specific rules and principles, which are outside the scope of this chapter.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

There is no specific law governing workplace investigations in Brazil, but Law 14.457/2022 states that companies must have rules that relate to sexual and other forms of harassment in their internal policies, address the rules for receiving and processing accusations, assess the facts, and discipline any individuals directly and indirectly involved in acts of sexual harassment or violence.

If the investigation has any connection with anticorruption matters, the investigation procedure must comply with Law 12846/2013 (Brazilian Anticorruption Act) and Decree 8420/2015.

As a result, Brazilian employers usually follow the rules determined by internal corporate policies, which often result from international regulations and principles that differ from the Brazilian ones, which inadvertently expose the Brazilian subsidiary to liability. The answers below will highlight common

examples of this, when appropriate.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

In Greece, workplace investigations are not heavily regulated.

However, internal disciplinary procedures are governed by certain general principles, while there is also legislation regulating certain aspects of investigations opened in the context of whistleblowing procedures or concerning complaints for workplace violence or harassment. These include Law 4990/2022, which transposed EU Directive 2019/1937 into Greek Law; and Law 4808/2021, which ratified the ILO's Violence and Harassment Convention, 2019 (No190) and introduced relevant provisions.

As far as disciplinary procedures in private-sector companies are concerned, employers that must have internal labour regulations in place (ie, those with more than 70 employees) or opt to adopt them voluntarily, can regulate the procedures themselves.

In the public sector, internal investigations are governed by disciplinary provisions included in the civil servant code.

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

First, the employer should appoint an investigator or investigative team that will be responsible for conducting the investigation. Next, the employer or the investigators might think about communicating with the involved employees. It depends on the situation if this is a good idea or not. In general, it can be recommended that the employer is transparent towards the involved employees and openly communicates about the (start of the) investigation process. This is definitively the case if it is already clear that the

involved employees are under scrutiny because of their actions. In this case, the actual investigation can begin with a hearing of the involved employees. However, if there is a risk that employees will hide or destroy evidence or will collude to prevent the employer from finding the truth, the investigation can also start without any communication. In this case, it would be better to start collecting evidence before hearing from the employees involved.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Workplace investigations usually commence on the receipt of an allegation, which can be presented orally or in writing to an assigned member of the company (usually, within the HR, Compliance or Legal Departments, or to a direct supervisor) or via an external channel, as determined by the company's policy.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Internal investigations can be initiated either upon a complaint or report by an employee, (or other persons providing services or seeking employment, etc) in the workplace or by the employer as part of their managerial right.

If from an employee, the complaint or report may fall within the scope of an internal disciplinary procedure, if any, or may concern an alleged workplace violence or harassment incident, or fall within the scope of L.4990/2022 on the protection of persons who report breaches of Union law.

Reports by whistleblowers are submitted to the manager with responsibility for receiving and monitoring reports, a person appointed for that purpose under L.4990/2022. Complaints for incidents and harassment in the workplace can also be submitted, according to L.4808/2022, to the person or internal body specifically assigned to receive such complaints. Both laws require the employer to define the persons competent for receiving and monitoring complaints or reports and notifying the employees *stricto sensu* and any other persons falling within the scope of the respective provisions.

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Switzerland

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

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)?

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

In principle, you cannot unilaterally suspend an employee during a workplace investigation, as there is a risk of constructive dismissal (ie, wrongful termination of the employment contract by the unilateral modification of one of its essential elements). Consequences could include the payment of an indemnity in lieu of notice based on seniority as foreseen by the Employment Contracts Act, plus possible damages (three to 17 weeks remuneration if an unreasonable dismissal, plus alternative or additional damages based on real prejudice suffered). The parties can nevertheless agree on a suspension of the employment contract. In this scenario, the remuneration will still have to be paid. Furthermore, a suspension could be a sanction that follows the outcome of the investigation, but even then it will only be possible for a limited time (and a suspension without pay is usually only allowed by the courts for a maximum of three days). However, if the complaint is about sexual harassment, bullying or violence at work, the prevention advisor (see question 4) can recommend that the employer take certain actions, which in grave circumstances could lead to employee suspension. The suspended employee should continue to receive his pay if this occurs.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Yes, an employee can be suspended during or before a workplace investigation. However, suspending an employee is not a legal requirement in Brazil. It is also not standard business practice and entails legal risk, as detailed below.

While internal policies in line with a company's global investigation approach may determine whether investigated employees are suspended during an investigation, the suspension of an accused employee is not recommended. The only exception is when the accused employee, upon becoming aware of the existence of the investigation, poses a clear and imminent risk of physical danger to other employees or interfering with the investigation.

The suspension of an employee during an investigation makes it difficult for the company to keep the investigation confidential, because the absence of the investigated employee will have to be explained to his or her colleagues and business contacts. As a result, the investigated employee may be exposed to the stigma of being associated with potential misconduct.

Even if the accusation is confirmed and the individual is terminated with cause, the employer cannot disclose the reason for the termination or that the contract was terminated for a cause or violation in the employee's employment records. Also, if the employer shares such information with prospective employers they may be liable for damages.

Termination for cause on the grounds of dishonest conduct, if not upheld by the labour court, usually leads to liability for damages to the former employee due to the accusation and the stigma associated with it.

Therefore, if the company decides to suspend the employee during the investigation and terminate his or her employment at the end of the investigation, the suspension will be associated with wrongdoing, and the individual will have grounds to claim damages for the association between the termination, the investigation and wrongdoing, which will likely be presumed by a labour court (damage *in re ipsa*).

On the other hand, if the accusation is deemed groundless, the connection between the employee and potential wrongdoing resulting from his or her suspension can be used as grounds for damages because of the resulting environment at the workplace or the development of mental health conditions such as depression or anxiety by the investigated employee due to the investigation and uncertainty about the negative effect of it on his or her reputation.

Because suspension during an investigation is not a disciplinary measure, if the company decides to suspend, the employee's salary cannot be affected. Also, the suspension period must be as short as possible, and can in no circumstance be longer than 30 days. If it exceeds 30 days, it would trigger termination for cause by the company, which increases the amount of statutory severance due to the employee.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Internal labour regulations may allow for the suspension of an employee when there is reasonable suspicion that a disciplinary offence has been committed. Given that under Greek law employees have the right to receive wages and to be employed, suspension without a specific provision in the internal labour regulation may only be imposed in an extreme case where the offence and the risk of keeping the employee employed during an investigation is obvious.

Payment of remuneration during suspension should not be withheld, otherwise, the suspension could be considered a disciplinary penalty not provided in law and imposed without completion of the disciplinary procedure, thus illegally harming the employee.

In any case, suspension is one of the ultimate measures that may be taken, in contrast to, for example, a change of work position.

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

In general, there are no legal minimum qualifications, the employer can delegate the investigation task to anyone. Of course, it is strongly recommended to appoint someone who is not involved in the case and who can lead the investigation objectively with the necessary authority to take investigative measures.

However, in the specific case of an official complaint due to sexual harassment, violence or bullying at work, the investigation will be conducted by the prevention advisor for psychosocial aspects. Next, if the investigation is based on an internal whistleblowing report, there will have to be an independent reporting manager responsible for receiving the report, giving feedback to the whistleblower and ensuring a decent follow-up to the report. Logically, the reporting manager will lead the investigation in this case, but he can be assisted by other persons or a team who are bound by a duty of confidentiality.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

There is no statutory rule, and therefore the investigator can be chosen by the company.

In sensitive matters, it is recommended that attorneys undertake the investigation due to legal privilege. Engaging external lawyers increases the confidence of witnesses and parties in the independence and lack of bias of the investigation process, especially when the allegations involve senior employees.

Additionally, attorneys are trained to collect information based on legal thresholds that apply to the allegations, allowing the decision-makers to understand the events as they would be posed before a labour judge or a prosecutor, and enabling them to clearly assess the legal risk involved in the situation.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

As far as the persons in charge of an internal investigation are concerned, L. 4990/2022 on the protection of persons who report breaches of Union law provides for certain conditions that should be met when exercising their duties (ie, being impartial and abstaining when there is a conflict of interest), which also apply as general principles in all disciplinary procedures. Whistleblowing legislation stipulates that persons appointed to receive and investigate a whistleblowing procedure should meet certain conditions, including no penal proceedings against them, no disciplinary proceedings or convictions for specific offences, and no workplace suspensions.

Official disciplinary procedures are conducted by the competent bodies as described in the respective internal labour regulations.

Although not specifically regulated, support from external advisors (eg, lawyers) is allowed.

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

This is only possible if the employee claims that his or her rights (eg, the right to privacy) are violated by the investigation (but this will merely limit the investigation methods) or if he or she finds that the investigation constitutes an abuse of rights. In any case, it will be very hard for an employee to completely halt the investigation.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Employees are not legally prohibited from bringing legal action, but because investigations are within an employer's powers, a legal action to broadly stop an investigation (as opposed to an injunction to prevent a limited measure within an investigation, such as the review of private messages) would likely be deemed groundless.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Although there is no specific legal provision, access to legal action and judicial proceedings cannot be obstructed under any circumstances as this is a fundamental right under the Greek constitution. Thus, if an employee manages to bring legal action to stop the investigation (eg, a prolonged investigation for a frivolous complaint harms them), then the investigation may have to be temporarily paused or permanently terminated depending on the court decision.

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

Employees cannot be forced by their employer to act as a witness. If they decide to nonetheless testify as a witness, they do not, in principle, have particular rights. If the employee puts himself in a difficult or even dangerous position to act as a witness, it is up to the employer to offer the necessary protection or take measures to prevent any harm (eg, by keeping the identity of the witness confidential or by planning the hearing at a place or time when the employees involved are not aware of it).

However, this is not the case for whistleblowing reports, where a witness might be seen as a “facilitator”

who can receive protection against any retaliation by the employer.

Also, workers who were direct witnesses to official allegations of sexual harassment, violence or bullying at work are protected against retaliation by the employer. This also applies to witnesses in court.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Employees cannot be compelled to act as witnesses. Employers may have trouble enforcing internal policies stating that employees who refuse to participate in investigations will be disciplined (warned, suspended or have their contract terminated for cause), but can terminate their contract without cause.

There are no explicit legal protections for employees acting as witnesses, but it is common best practice to have witnesses' identities protected to the extent necessary for the investigation, and to protect them from retaliation.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Indirectly involved employees may be interviewed as witnesses in the context of the investigation, as the employee has a duty of loyalty towards the employer originating from the employment relationship. However, they cannot be forced to do so (in contrast with criminal procedures). Any harmful act that could be considered retaliation against witnesses in the context of violence or harassment or whistleblowing investigation is prohibited. In addition, the identity of any employees as witnesses is also covered by the principle of confidentiality.

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

Here, the investigation “collides” with the right to privacy of the persons involved.

First, the rules and principles of the GDPR will apply if personal data is involved. Therefore, the employer will have to find a data-processing ground, which could be his or her legitimate interest or the fact that the investigation could lead to legal proceedings, etc. The data processing should also be limited to what is proportionate and the data subjects should be informed. Due to this obligation, it is arguable that the GDPR policy already provides the necessary information for the employees not to jeopardise the investigation. In any case, data subjects should not be able to use their right to access data to ascertain the preliminary findings of the investigation (which are confidential) or any confidential identities involved (eg, in the whistleblower procedure, the identity of the report should be protected at all times).

Also, the employer should follow the procedure of Collective Bargaining Agreement No. 81 on searching the e-mails or computer files and internet searches of employees. This CBA limits the purposes for searches and lays down a double-phase procedure that needs to be followed if private data is involved. Next to this, the employer should also take into account the case law of the European Court of Human Rights, which only allows e-mail and computer searches based on the following:

- whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and the implementation of such measures;
- the extent of the monitoring and the degree of intrusion into the employee’s privacy (including a distinction between the monitoring of the flow or the content of the communications);
- whether the employer has provided legitimate reasons to justify monitoring of the communications and accessing of their actual content; and
- whether it would have been possible to establish a monitoring system based on less intrusive measures, the consequences of the monitoring for the employee who is subject to it, and whether the employee had been provided with adequate safeguards.

Next, if the employer wants to use camera images, the rules of Collective Bargaining Agreement No. 68 should have been followed when installing cameras. If not, the images might have been collected illegally.

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Brazil

Author: *Patricia Barboza, Maury Lobo*

at CGM

The Brazilian General Data Protection Law (LGPD) does not have specific rules or principles that apply to internal investigations conducted within private organisations. Despite that, the general principles and obligations set forth by the LGPD apply to any processing of personal data carried out within the context of such investigations. As a result, the company must ensure the transparency of such processing activities through a privacy notice addressed to the data subjects; only process the personal data that is necessary for the investigation; define the lawful basis that applies to such processing activities (especially for sensitive data); and apply any other obligations established by the LGPD.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

GDPR and the provisions of L. 4624/2019 regulate the gathering of physical evidence from a data protection perspective, providing, among other things, that personal data should be processed with transparency and to the extent necessary for the investigation.

L.4990/2022 on the protection of persons who report breaches of Union law regulates data protection issues in the context of whistleblowing investigations, mainly to safeguard confidentiality throughout the investigations.

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Switzerland

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

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.

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



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

The employer is, in principle, not entitled to search the employee's private possessions, except with the explicit consent of the employee. Digital files on the computer or laptop of an employee can be searched under the rules of CBA No. 81 (see question 7) and other privacy rules.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

No; employers are only generally allowed to search the work tools they provide to employees, such as company mobile phones, electronic files, and company email and other electronic communications. However, they may also request that employees turn over any company documents in their possession.

Searches of employees' private possessions or files during an investigation can only occur with the verifiable consent of the employee.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

As a first step, the employer should ask for the employee's permission to access their possessions and files. Employment contracts and internal labour regulations may include provisions regarding an employer's access to employees' documents created and kept for business purposes or related to business activity.

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

If the investigation is based on a whistleblower report that falls under the scope of the upcoming rules, the investigators are bound by a strict duty of confidentiality, especially regarding the identity of the report. The rules also provide some procedural deadlines for feeding back to the reporter. Within seven days of receiving the report through an internal reporting channel, the reporting manager needs to send a receipt to the whistleblower. From that moment, the reporting manager has three months to investigate the report and give feedback and an adequate follow-up to the report. Next, the rules offer strong protection against any retaliatory measures the reporter may experience. Regardless, these rules are mostly intended to offer the necessary protection for whistleblowers and to ensure that companies take necessary investigative steps following a report, but they do not include much information about the actual procedure of the investigation besides certain deadlines, nor do they deal with other employees involved (or under investigation).

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

If the investigation involves matters within the scope of a specific whistleblowing policy, the policy rules should prevail against the general investigation rules if there is a conflict.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

L. 4990/2022 includes specific requirements regarding, among other things, the procedure of receiving and

investigating respective reports, confidentiality issues (especially regarding the identity of the whistleblower), data protection issues (including restrictions to the right of access) and the employer's right to keep a record of the relevant complaint and investigation. Such provisions are expected to be further detailed by Ministerial Decisions in future.

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

A workplace investigation is often a sensitive matter that requires necessary confidentiality to find out the truth discreetly and objectively. Nevertheless, there is often pressure from employees, trade unions or even the media and general public to be transparent and communicate about the case. From a legal perspective, it is not recommended to communicate openly about an ongoing investigation, as this can jeopardise the investigation or the possibility of taking disciplinary measures.

Whistleblower investigations will be bound by a strict duty of confidentiality regarding anything that could reveal the identity of the reporter.

In complaints due to sexual harassment, violence or bullying at work, the prevention adviser is bound by professional secrecy. Consequently, he or she may not disclose to third parties any information about individuals that have come to his or her knowledge in the performance of his or her duties. However, he or she still has the freedom to inform the people concerned to carry out his or her tasks in the procedure.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Law 14.457/2022 states that companies must guarantee the anonymity of accusers. As a result, it is best practice that companies allow for anonymous submissions, or allow accusers to voluntarily disclose their identity while acknowledging that they agree that it will be kept confidential to the extent required by the

investigation.

Also, companies should have internal rules stating that all parties involved in an investigation (accusing party, accused party, witnesses, investigators, and any other person that has any contact with the investigation) must keep the existence of the investigation and of the events related to the investigation confidential to the extent required by the investigation, and discipline any individuals that violate this.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Confidentiality applies as a general principle in disciplinary investigations.

Moreover, L. 4990/2022, which transposed EU Directive 2019/1937 into Greek Law, regulates the issue of confidentiality during investigations that start based on an internal report. The managers conducting the investigation must respect and abide by the rules of confidentiality regarding the information they have become aware of when exercising their duties[1]. They must also protect the complainant's and any third party's (referred to in the report) confidentiality by preventing unauthorised persons from accessing the report[2].

Finally, L. 4808/2021 provides that employers must create a procedure that should be communicated to employees regarding all the necessary steps of an investigation following a complaint. Throughout the whole process, the employer, managers and the employer's representatives responsible for the investigation must respect and abide by the rules of confidentiality in a manner that safeguards the dignity and personal data of the complainant and the person under investigation[3].

[1] Law 4990/2022, art. 9 par.8(b)

[2] Law 4990/2022, art. 10 par. 2(e)

[3] Law 4808/2021 art. 5 par.1(a) and 10 par.2(b)

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

In general, the employee should be informed that there is an ongoing investigation (unless this could jeopardise the investigation, in which case disclosure could be postponed until this is no longer the situation). Next, before imposing measures or sanctions, the employee should be allowed to be heard or to give his or her version of the facts. Of course, the employee can only do this if he or she is aware of the facts being investigated. It is not necessary to give the employee a full insight into the investigation, only the necessary facts that allow him or her to offer a defence are sufficient.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

There is no obligation to inform an employee under investigation that this is the case, and it should not happen automatically.

While some policies require that the investigated employee be informed about the allegations against them at the beginning of the investigation, from a local perspective it is recommended that the accused employee be notified about the existence of the allegations if, after a reasonable review, there are elements that suggest that the accusation may be material.

In this context, the employee should be informed about the accusation and be allowed to confirm, deny, provide further context or justify each reported or identified event; offer evidence; and indicate persons or sources of information that could corroborate his or her defence. Information about the accusation must be focused on facts rather than on how the company obtained the information.

If the accusation is found to be groundless after initial review, involving the accused employee at the

beginning of the process may have triggered unjust and unnecessary stress and a disruption in the employment relationship that may not be satisfactorily repaired by a determination that the accusation was void. This may result in a legal liability for the company or HR issues that could otherwise have been avoided.

Last updated on 14/09/2023

Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

As a matter of general principle, employees under investigation must have access to the necessary information to be able to defend themselves, in the context of their fundamental right to a fair trial and hearing.

Moreover, from a data protection perspective, they may be entitled to access their personal data in the respective files.

The above rights must be balanced with confidentiality and the need to safeguard the completion of the investigation and to protect the complainant from retaliation.

According to L.4990/2022, all data and information as well as the identity of the complainant are confidential, and any disclosure is only permitted where required by the EU or national legislation or during court proceedings, and only if it is necessary for the protection of the defence rights of the employee under investigation. The section of L.4808/2021 for the elimination of workplace violence and harassment does not regulate this specifically but provides a general obligation for confidentiality.

Last updated on 03/04/2023

Switzerland

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

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.

Last updated on 15/09/2022

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



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

If the complainant made use of an internal whistleblowing procedure, confidentiality regarding the identity of a reporter is mandatory. Also, in other cases and for other involved persons (witnesses), it is recommended to keep their identity confidential to prevent the risk of intimidation or other negative consequences.

In complaints due to sexual harassment, violence or bullying at work, if the prevention adviser heard or took written statements from persons that were considered useful for the evaluation, these persons may remain anonymous.

The employee must, nevertheless, receive sufficient information to be able to offer a defence concerning the facts of which he or she is accused.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Yes, the identity of the complainant, witnesses and sources of information for the investigation should be kept confidential.

Last updated on 14/09/2023



Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

According to express provisions of L.4990/2020, in principle personal data and any other information that may lead directly or indirectly to the identification of the complainant must not be disclosed to anyone other than the investigating individuals unless the complainant gives consent^[4] and that is why pseudonyms should be used. The witnesses and third persons that aid the complainant are deemed as “mediators” by the Law and their contribution to the procedure should be confidential^[5].

L.4808/2021 does not indicate when such disclosures are permitted; however, it is obvious that this is a matter of cost-benefit analysis where the public interest and the fundamental rights of the involved persons should be considered in a balanced way to ensure the best results. From a data protection perspective, it could be argued that the person under investigation’s right to know the identity of the complainant, witnesses or sources of information should be limited to protect the rights of these persons.

^[4] Law 4990/2022 art.14 par.1

^[5] Law 4990/2022, art.3 par. 7 and art.10 par.2(e)

Last updated on 03/04/2023



Switzerland

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

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.

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



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

In principle this is possible. However, these NDAs do have their limits and cannot prevent involved persons from, for example, bringing a legal claim or filing a report if they are legally entitled to do so. Under whistleblower rules, a reporter can even publish his or her complaint under certain circumstances.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Yes, NDAs may be executed to reinforce the confidentiality obligations outlined in the company's policies and reinforced in interviews.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

NDAs are an option, especially to outline in detail the obligations of the persons conducting the investigation, which is also provided for in law. On the other hand, NDAs will not prevent persons involved from providing information to the competent authorities in the context of criminal or other similar procedures, where they must do so by law. Moreover, they may not protect confidentiality if persons who report breaches of Union law decide to make an external or public report, according to the provisions of L. 4990/2022.

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Switzerland

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

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.

14. When does privilege attach to investigation materials?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

If the investigation is conducted by a prevention advisor, the investigation and the prevention advisor are bound and protected by a professional duty of confidentiality.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Privilege attaches to investigation materials when attorneys conduct interviews and take notes, and when they write reports and recommendations.

However, if other persons participate in an interview or write a report, and they are not attorneys, they can be required to testify about what they witnessed while participating in the interview or to discuss or disclose their investigation report.

For this reason, when starting an investigation, and depending on the matters to be investigated, it is important to determine whether it is convenient to allocate lawyers to certain roles to increase the company's control of corporate confidentiality resulting from third-party involvement in the investigation.

Attorneys should also clearly state to participants of the investigation that they are attorneys representing the company and that their work papers fall under attorney-client privilege and will not be shared with them.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Regarding L.4990/2022 for whistleblowers' procedures, many categories of privilege may occur during an investigation, such as: attorney-client privilege; doctor-patient privilege; and court or other proceedings' privilege deemed as classified. L.4990/2022 provides that its provisions do not affect any of these privileges and these privileges supersede^[6].

Privilege may also be attached to investigation materials in investigations relating to workplace harassment and violence incidents; however, since L.4808/2021 does not offer a specific provision and criminal proceedings may also commence, the matter of privilege must be examined ad hoc.

[6] Law 4990/2022 art.5 par.2(b) and par.2(c)

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Switzerland

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

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?

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

An employee can be assisted by a member of a trade union. They are also free to consult a lawyer.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Legally, a minor or someone with limited mental capacity must be represented by his or her parents or

legal guardian in a meeting at work. Besides that, employers are not legally required to allow any external person to accompany employees during investigations, since these are internal proceedings and, generally, employee participation should be voluntary and not subject to retaliation, including if the employee refuses to participate.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Greek law does not specifically regulate the right to be accompanied or have legal representation during internal investigations for private-sector employees.

However, the right to legal representation established in article 6 of the European Convention on Human Rights could be interpreted to cover cases such as internal investigations in the workplace. In addition, according to article 136 of Civil Servant Code, the employee under investigation has the right to be represented by an attorney at law. There is an additional argument regarding private-sector employees and their right to legal representation, by applying this provision by analogy.

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Switzerland

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

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.

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



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

At the request of the involved employee, an employee can be assisted by a member of the trade union delegation, for example, during his or her hearing.

The works council should be informed of an investigation if there is a considerable impact on the company; this will only be the case if the investigation concerns a very serious, important or widespread issue. This information should be communicated as soon as possible and before measures are taken as a result of the investigation. This is only a right to information, not consultation. Moreover, members of the works council may be asked to respect their duty of confidentiality. However, as the enforcement of this duty of confidentiality is difficult, the timing of the information should be chosen wisely so it does not jeopardise the investigation.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

No, there is no such right.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

L.4990/2022 explicitly states that the exercise of employee rights that refer to consulting from representatives or trade unions and protection against any detrimental measure that results from those consultations does not affect the implementation of any legal provisions. The autonomy of social partners and their right to enter into collective agreements regardless of the level of protection provided by L.4990/2022^[7] is also unaffected.

Under L.4808/2021, legal persons and associations of persons, including trade unions, that have a legitimate interest in doing so may, with the consent of the complainant, bring an action in the complainant's name before the competent administrative or judicial authorities. They may also intervene in their defence^[8].

[7] Law 4990/2022 art.5 par.2 (e)

[8] Law 4808/2021 art.14

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Switzerland

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

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?

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

There are no other mandatory support measures. However, an employer is free to offer additional support, for example, by granting leave from work. If tensions at the workplace are high, it may be a good idea to ask the employee under investigation to take some leave. Some companies also provide certain legal, moral or even psychological support. If the complaint concerns sexual harassment, bullying or violence at work, the prevention adviser can also recommend that the employer take additional measures to support certain employees.

Furthermore, under the whistleblower rules, an external reporting authority can grant any support measure (eg, legal advice or financial, technical, psychological or media-related, social support).

For complaints due to sexual harassment, violence or bullying at work, and if the facts are serious, the prevention adviser should, during the examination of the request and before giving his or her opinion to the employer, propose protective measures to the employer. These measures are necessary to avoid serious damage to the complainant's health or a significant deterioration in the situation (for example, causing opposing parties to commit criminal offences). The final decision on taking these measures rests with the employer. This means that the employer does not necessarily have to take the measures proposed by the prevention adviser. They may take other measures that provide an equivalent level of protection for the employee.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

It is highly recommended that investigation interviews are conducted in the interviewed person's native language, even if the individual speaks the language used for business within the company, to ensure that there is no miscommunication or loss of accuracy in the determination of the facts. Also, speaking their native tongue reduces the discomfort of participating in the interview and potential extra work due to post-interview correction or confirmation. Depending on the scope of the investigation, the company can have attorneys who speak both the individual's language and the company's business language conducting interviews.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

According to L.4990/2022, any form of retaliation against complainants is prohibited, including threats of retaliation[9]. The complainants have the right to cost-free legal advice about possible acts of retaliation as well as cost-free provision of psychological support (to be defined by Ministerial Decisions)[10]. In terms of other types of support, the complainants are not in principle liable for the acquisition of information or releasing the information they reported under specific conditions (eg, the acquisition or access does not independently constitute a criminal offence, if they had reasonable grounds for believing that a report was necessary to reveal the violation)[11].

L. 4808/2021 states that the dismissal or termination of the legal relationship of employment and any other discrimination that constitutes an act of revenge or retaliation is prohibited and invalid[12].

[9] Law 4990/2022 art.17

[10] Law 4990/2022 art.19

[11] Law 4990/2022 art.18 par.1(a)

[12] Law 4808/2021 art.13

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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.

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



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

If the investigation is not protected by confidentiality towards the employer (e.g. the prevention advisor cannot disclose confidential information to the employer), it could result in further measures taken by the employer or lead to a new investigation.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

If unrelated matters are revealed as a result of the investigation, the company must be notified and must start a new investigation regarding them per the appropriate rules, without affecting the original investigation.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

If any unrelated matters are revealed as a result of an investigation and are of legal importance, the applicable legal provisions must be implemented and any relevant policies or agreements between the involved parties should be taken into account. For example, if the reporting procedure sheds light on other criminal acts, criminal law procedure may be followed if the matter is reported to the competent authorities.

If these unrelated matters fall under the ambit of another company's policies, the relevant procedures may also be followed separately. However, the employee under investigation must be allowed to defend him or herself, otherwise he or she may raise complaints relating to the procedural guarantees of the investigation.

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

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?

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

This will depend on where the employee raises a grievance and the content of the grievance. If it is against the employer, the investigation can take this into account and continue from there. If the grievance is raised against the authorities, it will depend on the steps taken by the authorities.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

If the object of the grievance is connected to the ongoing investigation, the investigator may pursue that grievance within the same procedure or open a separate matter, under the company's rules governing such a situation.

If the object of the grievance is not connected to the investigation, the employee must report the matter, or the investigator can do it, if the company's policies allow it.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Employees under investigation frequently raise grievances during investigation procedures that are dealt with on a case-by-case basis. The grievances raised by the employee under investigation are examined by the employees responsible for the investigation. They may either pause the relevant proceedings and review the grievance, especially if the claims of the employee under investigation are linked to a breach of his or her data or hearing rights, or they may continue the investigation.

Switzerland

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

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).

Last updated on 15/09/2022

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

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

If this occurs, there is a risk that any measure resulting from the investigation (eg, a dismissal) can be (wrongly) interpreted as discrimination based on the illness of the employee. However, if the employer can prove that the measure is not related to the illness but solely related to the investigation (which is also not related to the illness), there may be no discrimination. The sickness of the employee may prevent the continuation of the investigation because, for example, it becomes impossible to hear from the employee. In this instance, the investigation can be suspended, postponed or extended until the employee returns. If it is a long-term absence, this could lead to a disproportionate amount of time to complete the investigation. Therefore, the employer should take any necessary steps to invite the ill employee to a hearing anyway (eg, through digital means). If the employee unreasonably refuses (several) of these invitations, it could be argued that the employee is wilfully boycotting the investigation and therefore forfeits his or her opportunity to be heard.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

Sick leave suspends the employment agreement, and as a rule the employee should not be contacted during such a suspension. The investigation may continue without the participation of the investigated employee while that employee is absent, have its conclusion suspended while he or she is on leave, and

resume once the employee returns to work.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

In principle, the health of an ordinary employee would not prevent the investigation procedure from taking place (eg, interviews with witnesses or the collection of evidence would not be postponed or suspended). However, if the employee under investigation is unwell and they can't participate in the procedure, the investigation may be suspended or postponed until the employee can take part. Bearing in mind the majority of company internal policies and regulations governing workplace investigations provide for a specific framework and timetable for the whole procedure to be completed, the long-term sickness of an employee under investigation may impede the completion of the procedure in the prescribed time. As a result, the person conducting the investigation may seek alternative measures to facilitate participation (eg, teleconferencing).

On a related note, if sickness occurs after the investigation is completed and the employer decides upon the imposition of disciplinary measures against the said employee and the initiation of a relevant procedure, the decision should be duly and timely communicated to the employee, irrespective of whether his or her presence in the workplace is not possible because of the illness.

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

In legal proceedings, a criminal procedure takes precedence over civil procedures. However, disciplinary internal proceedings (like a workplace investigation) and an investigation by the authorities may run parallel to each other. If the public investigation leads to a court procedure that results in the acquittal of the employee under investigation, it could lead to legal problems if the employer has already imposed sanctions based on the same employee. Therefore, the employer could make the internal investigation dependent on the public investigation, and could take preventive measures while awaiting the outcome.

The public authorities normally have the legal competence to request information that can help them in their investigation. Therefore, they could rightfully ask the employer to share evidence or findings from the internal investigation.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

The company may be required to share information or documents with authorities such as a judge, the police, or the Public Attorney's office, or be subject to a government authority's dawn raid. Workplace investigations can and in most cases should continue, and in such circumstances client-work privilege will be essential to enable the employer to control information being shared with third parties.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Incidents of violence and harassment may be dealt with by certain independent authorities, such as the Labour Inspectorate Body and the Greek Ombudsman. The former is competent to impose sanctions on the employer if there is a breach of the general prohibition of violence and harassment at the workplace and the obligation of employers regarding the prevention of such incidents and the obligation to adopt policies within the business. The Greek Ombudsman is competent to deal with disputes when there is violence or harassment in the workplace coupled with discrimination due to, for example, gender, age, disability, sexual orientation, religious beliefs, or gender identity. Moreover, the applicable legal framework^[13] stipulates that victims of violence and harassment are entitled to lodge a report before the Labour Inspectorate Body and the Greek Ombudsman. This is in addition to the judicial protection he or she may seek and the internal investigation procedure to which he or she may have recourse, without specifying whether internal proceedings may be suspended before the regulatory bodies decide on the matter.

On the other hand, the National Transparency Authority and in certain cases the Hellenic Competition Commission are external reporting channels for employees reporting breaches of Union law. In such cases, L.4990/2022 (article 11 paragraph 5) stipulates that the investigation before the National Transparency Authority is not suspended if reporting procedures before other regulatory authorities have been initiated.

Moreover, criminal investigations can run in parallel with internal probes.



Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

It is highly recommended to inform the employee under investigation of the outcome. If disciplinary measures are imposed upon him or her, the legal procedure must be followed and the sanction must be imposed or communicated the day after the employer or his delegate has established the wrongdoing of the employee.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

There is no legal obligation to inform them of the outcome. Any obligation would come from the company's policies.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

The employer has an obligation, towards the alleged victim but also the alleged perpetrator, to carefully investigate the report and any existing evidence before making decisions. The employee under

investigation must be informed about the outcome of the procedure and any measures adopted in this regard. The respective decision must have due justification.

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Switzerland

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

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?



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

It is recommended to limit the communication to the findings and details of the report that are necessary for the employee to fully understand the outcome. This is especially true if the investigation is bound by a duty of confidentiality (eg, under the whistleblowing rules), as the employee should not be allowed access to the full report.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

There is no legal requirement or recommendation for the company to share the full or partial report or

findings. It is also not a recommended measure. Therefore, unless the internal rules determine that the company must do it, any answer to queries should be limited to the fact that the investigation was concluded, and the company took the appropriate action.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

There is no explicit legal provision stating the whole report must be communicated with the employee under investigation. The legal framework (L.4990/2022 and L.4808/2021) is governed by strict confidentiality obligations and obligations to protect the complainant's data. From a data protection regulation perspective, it could be argued that the right of the person under investigation to know the identity of the complainant, witnesses or sources of information should be limited to protect the rights of such persons.

However, if the outcome of the investigation leads to the imposition of disciplinary measures, the right of the employee under investigation to request the whole investigation report, to aid in their defence is enhanced. Moreover, if a complaint is made in bad faith or is unfounded, it may be supported that the employee under investigation is entitled to receive full documentation so he or she can seek adequate legal protection or file an action before the courts.

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Switzerland

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

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?

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

If the investigation leads to the establishment of grave errors by the employee, this can lead to sanctions. The employer must follow the procedure laid down in the internal work rules of the company and can only impose sanctions that are included in the internal work rules. In general, these are: a verbal warning; a written warning; a suspension (remunerated or not); a fine (capped to one-fifth of daily remuneration); and dismissal. If there are very serious errors leading to an immediate inability to continue the employment relationship with the employee, the employer can dismiss the employee with urgent cause without any notice period or indemnity in lieu of notice (following the specific procedure for these types of dismissals). In less serious cases, the employer could still dismiss the employee with a notice period or indemnity in lieu of notice. In principle, the employer has a right to dismiss the employee, even if this sanction is not included in the internal work rules.

As said previously, disciplinary sanctions (included in the internal work rules) must be communicated to the sanctioned employee the day after the employer or his delegate has established fault. The sanction must be registered in a sanction register, with the name of the employee, the date, the reason and the nature of the sanction. If there is a fine, the amount of the fine should be mentioned. The proceeds of the fines must be used for the benefit of employees. Where a works council exists, the use of the proceeds of the fines must be determined after consultation with it.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

If investigators conclude that a breach has occurred, the company may determine the appropriate response, which may include verbal or written warnings; the suspension of employment without payment (for up to 29 days) or termination of employment without or with cause; a review of policies or operational protocols; and new training modules or the updating of training modules.

If the investigators conclude that a breach has not occurred but determine that the report was made in good faith, the case must be set aside. If the investigators determine that the report was made in bad faith, the employer must determine how to respond to the bad-faith reporter.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

For workplace violence and harassment investigations, depending on the outcome of the internal investigation, the employer may adopt certain measures including, for example, recommendations to the employee under investigation, changes to the employee's working hours and transfer to another department.

If the employer decides to terminate the employment relationship, without having previously followed existing corporate policies regarding reporting procedures or without having provided the alleged perpetrator with the right to be heard, the dismissal could be deemed invalid. In any case, the measures adopted should be appropriate and proportional to the act committed.

Switzerland

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

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?

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

If the investigated acts constitute a crime, the authorities or the police should be informed. In certain cases, not doing so could lead to the company being accused of concealing a crime or becoming jointly responsible for it. However, if the company is the only victim of the crime and it is minor, the company may choose not to inform the authorities. For example, there is an enormous difference between a bank employee stealing large amounts of money from clients and an employee who is stealing toilet paper from the company. As stated above, the interview records could be at risk of disclosure if the authorities or police seize them for their investigation.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

There are no legal requirements for the company to share the investigation findings with any party, including the reporter and the investigated party, so the employer must carefully consider the pros and

cons of doing so on a case-by-case basis. Interview records can generally be kept private if interviews were conducted by an attorney.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

In principle, there is no specific obligation for investigating persons to disclose their findings. For proceedings before a court that have been initiated or investigated by the police or competent regulatory bodies, the relevant findings may be communicated under strict conditions and provided that the personal data of the parties involved are not publicly disclosed.

More specifically, under L. 4490/2022, in the context of whistleblowing procedures, personal data and any information that leads, directly or indirectly, to the identification of the complainant are not disclosed to anyone other than employees involved in the investigation, unless the complainant consents. The identity of the complainant and any other information may only be disclosed in the context of investigations by competent authorities or judicial proceedings, to the extent necessary for the protection of the employee under investigation's rights of defence. Confidentiality obligations govern the procedure for revealing trade secrets to police and regulatory bodies, especially in the framework of L.4990/2022.

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Switzerland

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

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?

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

According to the GDPR, personal data should only be stored for a proportionate amount of time. Usually, this means that it can be stored as long as it is relevant for the employment contract, and even afterwards, if there is a risk of legal proceedings (ie, regarding the dismissal of the employee).

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

The existence of the investigation should be kept on file for at least five years from the date of its conclusion. All information related to the investigation should be kept on file for the same period, but not on the employee's record, to avoid the risk of accidental access by unauthorised individuals.

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Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

Under the General Data Protection Regulation, employees' personal details and information must be kept in the business records for as long as is necessary for the purposes of the employment relationship. Otherwise, stored data must be deleted. However, under L.4990/2022[\[14\]](#), reports remain in the relevant record for a reasonable and necessary time, and in any case until the completion of investigations or proceedings before the courts that have been initiated as a consequence of a complaint against the employee under investigation, the complainant or any third parties.

[\[14\]](#) L.4990/2022 art.16 par.1

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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.

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



Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

In general, abusive investigations could lead to a legal claim regarding the abuse of rights. During an investigation, an employer should be guided by principles of due diligence and not take disproportionate action. If the investigation causes unnecessary damage, involved employees could file for compensation (eg, before the labour court). Next, the employer is also responsible for following the mandatory procedure for official complaints regarding sexual harassment, bullying and violence at work and investigations of whistleblower reports. In the first case, an employer who does not follow the procedure or obstructs the procedure can be liable for penal or administrative fines (maximum 8,000 euro) or, if the employer has not taken necessary measures to mitigate the risks for the employee and the employee suffers damage to their health, they may be liable for a fine of a maximum of 48,000 euro and imprisonment for between six months and three years. In the second case (whistleblower procedure), if an employer did not follow or has obstructed the procedure, they can be fined up to 5% of the annual revenue of the preceding year.

If the complaints involve allegations of sexual harassment, violence or bullying at work, the employer might risk an investigation of the inspection on supervision and well-being at work. If the prevention advisor finds out, before giving his advice, that the employer did not take any suitable protective measures after they were recommended, the prevention advisor is obliged to call an inspection on supervision and well-being at work.

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Brazil

Author: *Patricia Barboza, Maury Lobo*
at CGM

The employer's legal exposure resulting from errors during the investigation depends on the error and the victim or victims affected. It may range from paying damages to a witness who was harassed because the company did not prevent retaliation from occurring; to the reversal of a termination for cause if a court determines that the evidence collected during the investigation did not meet the legal threshold to uphold it; to indemnification for a violation of privacy; or criminal prosecution because of unauthorised access to private communications.

Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

The employee can contest the decisions of disciplinary councils before the courts and request their annulment.

Moreover, in the framework of L.4990/2022, a monetary penalty and prison sentence (to be defined by an implementing Ministerial Decision) may be imposed on any person violating confidentiality obligations concerning the identity and personal data of employees or third parties included in the investigation procedure, while monetary penalties are also provided for legal entities[15].

Moreover, administrative fines may also be imposed if the employer does not comply with the legal requirements concerning the prevention of violence and harassment in the workplace.

Furthermore, the employee under investigation may initiate proceedings before the courts under tort law, by claiming compensation for moral damages suffered if the company did not comply with its confidentiality obligations after the incident (eg, due to the spread of rumours in the workplace). This may also be linked with criminal law proceedings against the persons responsible for dealing with the investigation (and not against the legal person, since under Greek law there is no criminal liability for legal persons).

On the other hand, the employer may also be exposed to liability vis-à-vis the complainant, witnesses or facilitators, for breach of confidentiality or other obligations prescribed in the respective legal provisions, or if there are retaliation measures.

[15] L.4990/2022 art.23 par.1

Last updated on 03/04/2023

Switzerland

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

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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Contributors



Belgium

Nicolas Simon
Van Olmen & Wynant



Brazil

Patricia Barboza
Maury Lobo
CGM



Greece

Angeliki Tsatsi
Anna Pechlivanidi
Pinelopi Anyfanti
Katerina Basta
Karatzas & Partners



Switzerland

Laura Widmer
Sandra Schaffner

www.internationalemploymentlawyer.com