

# Workplace Investigations

## Contributing Editors

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

### Australia

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Before commencing a workplace investigation, an employer must review the terms of any applicable employment contract, policy, procedure or industrial instrument. These documents will likely contain clauses that will dictate the investigation process.

There is also a significant body of common law that dictates how an investigation should be conducted and the procedural fairness that should be afforded to those involved. To ensure a workplace investigation is procedurally fair, employers must consider several factors, including:

- putting all allegations to the respondent in a manner which does not suggest a pre-determination of the outcome;
- conducting the investigation in a timely manner;
- providing the respondent with the opportunity to respond to the allegations;
- conducting a fair investigation process;
- making an unbiased (and not pre-determined) decision; and
- permitting the respondent and complainant to involve a support person or union representative.

Employers should also consider the additional steps they can take to conduct a best-practice investigation, including:

- being thorough and taking the time to plan the investigation;
- communicating clearly and fairly;
- considering whether the allegations are indicative of a wider workplace behaviour problem;
- maintaining confidentiality; and
- preventing victimisation.

Last updated on 25/09/2023

### Finland

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Mainly, the Occupational Safety and Health Act (738/2002). In addition, the following also have relevance in connection to a workplace investigation: the Employment Contracts Act (55/2001), the Criminal Code (39/1889), the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (44/2006), the Act on Equality between Women and Men (609/1986) and the Non-discrimination Act (1325/2014). In addition, the employer's own policies must be taken into consideration while conducting a workplace investigation.

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## Greece

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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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## 02. How is a workplace investigation usually commenced?



## Australia

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A workplace investigation will generally be triggered by an employee making a complaint; however, issues may also be brought to the attention of an employer through an anonymous tip, by suppliers or contractors, from customers or because of observations and hearsay.

Complaints can be made directly to Human Resources (HR), anonymously, by email to a line manager or a third party. While complaints do not need to be written and can be informal, brief or verbal, complaints of this nature can make the process harder and more information may be required.

The receipt of a complaint does not necessarily mean that an employer needs to undertake an investigation immediately. A grievance policy ordinarily contains a multi-step approach to dealing with complaints, starting with internal resolution options such as informal discussions, conciliation and mediation. However, an investigation should be commenced where:

- the complaint alleges serious misconduct or unlawful conduct;

- the employer is required to conduct a workplace investigation as per an employment contract, policy, procedure or industrial instrument; or
- the complaint is complex and requires clarity on what has occurred to establish the facts.

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## Finland

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When the employer becomes aware of possible misconduct, the employer must commence an investigation immediately, in practice within about two weeks. The information may come to the employer's knowledge via, for example, the employer's own observations, from the complainant or their colleagues or an employee representative.

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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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## 03. Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)?

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It is an important consideration as to whether any of the employees involved in the investigation should be suspended, stood down or asked to undertake alternative duties for the period of the investigation. This

decision will need to be made taking into consideration the nature of the complaint, any further damage to workplace relationships that could be caused by employees continuing to interact with each other, and potential work, health and safety issues.

It should not be automatic that the respondent is suspended as the employer will need to consider whether this is necessary in the circumstances. However, a period of suspension should be considered where:

- the allegations involve serious misconduct;
- there is a risk that the conduct will continue throughout the investigation;
- the respondent's presence could exacerbate the situation; or
- the respondent's presence could be disruptive to the investigation.

As an alternative to suspension, other options include working from home, performing amended duties or moving to a different workspace.

If an employee is suspended then they should ordinarily receive their full pay for this period. There are some exceptions to this, for example, if the employee is a casual employee or if a policy, employment contract or other industrial instrument allows the employee to be suspended without pay.

Generally, there is no minimum or maximum period a suspension should last, as this will depend on the length of the investigation.

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There is no legislation on temporary suspension in the event of a workplace investigation or similar. In some situations, the employer may relieve the employee from their working obligation with pay for a short period.

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



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Once the decision to undertake a workplace investigation has been made, it is important to decide who is the most appropriate person to conduct the investigation. For the investigation process to run smoothly a single lead investigator should be selected, although they may work with a larger team. The lead investigator and investigation team can be internally or externally appointed.

In deciding whether to appoint an external investigator an employer should consider:

- the nature of the allegations;
- the seniority of the respondent;
- whether a fair investigation can be conducted internally without any actual or perceived bias;
- whether there is a dedicated HR department with someone who has the required capability, skills and experience to conduct the investigation; and
- whether the employer wants the investigation to be covered by legal professional privilege.

If the employer decides to investigate the matter internally without appointing a third party, then the investigator does not need to have any specific qualifications. However, it is prudent to confirm that the investigator has the time and skills to conduct the investigation and that they can be objective.

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The employer must conduct the investigation, but the actual work can be done either by the employer's personnel or by an external investigator, for example, a law firm. Either way, there are no formal criteria for the persons executing the investigation; however, impartiality is required from the person conducting the investigation

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



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The respondent has several rights including the right to have the complaint investigated in a fair, impartial and adequate manner, to hear the allegations in full and to not be victimised. However, there is no avenue for a respondent to bring legal action to stop a procedurally fair investigation.

In 2014, Australia introduced an anti-bullying jurisdiction which gave the Fair Work Commission (FWC) the powers to issue a Stop Bullying Order. There have been circumstances where it has been successfully argued that an investigation itself amounted to bullying and accordingly the respondent applied to the FWC for a Stop Bullying Order to suspend the investigation.

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The employee does not have a legal right to stop the investigation. The employer must fulfil its obligation to investigate the alleged misconduct.

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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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## 06. Can co-workers be compelled to act as witnesses?

# What legal protections do employees have when acting as witnesses in an investigation?



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Co-workers can be interviewed as part of an investigation where they are witnesses to a complaint. If the employee refuses to attend the interview or is generally not cooperating with the investigation, the reasons for this will need to be considered carefully by the employer. Employers should consider whether there can be any amendments made to the interview process to accommodate the employee. However, an employer can make a reasonable and lawful direction to an employee to attend an interview. If an employee fails to comply with a lawful and reasonable direction, then it may constitute grounds for disciplinary action.

Witnesses who are employees are entitled to the legal protections that ordinarily attach to their employment, including not being bullied, discriminated against, or harassed and having their health and safety protected. Employers should also ensure that witnesses are not victimised as a result of participating in the investigation and that confidentiality is maintained.

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There is no legislation on a witness's role in investigations. However, the legislation on occupational safety requires that employees must report any irregularities they observe. Depending on the situation, participating in the investigation may also be part of the person's work duties, role or position, in which case the employer may require the employee to contribute to clarifying the situation. However, there is no formal obligation to act as a witness, and there is no legislation regarding the protection of witnesses. If a witness wishes, they may have, for example, an employee representative as a support person during the hearing.

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



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As part of an investigation, the investigator may want to collect evidence such as camera footage from CCTV, swipe card records, computer records, telephone records or recordings and GPS tracking. There are state-based workplace surveillance laws that operate in each jurisdiction in Australia. The laws recognise that employers are justified in monitoring workplaces for proper purposes, but this is balanced against employees' reasonable expectations of privacy.

The Privacy Act 1988 (Cth) (Privacy Act) also regulates how certain organisations handle personal information, sensitive personal information and employee records. The Privacy Act contains 13 privacy principles that regulate the collection and management of information. Employers should familiarise themselves with the privacy principles before conducting any investigation to ensure they are not in breach when gathering evidence.

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Generally, the basic principles set out by the GDPR and the Finnish Data Protection Act apply to data processing in connection with investigations, including evidence gathering: there must be a legal basis for processing, personal data may only be processed and stored when and for as long as necessary considering the purposes of processing, etc.

Additionally, if physical evidence concerns the electronic communications (such as emails and online chats) of an employee, gathering evidence is subject to certain restrictions based on Finnish ePrivacy and employee privacy laws. As a general rule, an employee's electronic communications accounts, including those provided by the employer for work purposes, may not be accessed and electronic communications may not be searched or reviewed by the employer. In practice, the employer may access such electronic correspondence only in limited situations stipulated in the Act on Protection of Privacy in Working Life (759/2004), or by obtaining case-specific consent from the employee, which is typically not possible in internal investigations, particularly concerning the employee suspected of wrongdoing.

However, monitoring data flow strictly between the employee and the employer's information systems (eg, the employee saving data to USB sticks, using printers) is allowed under Finnish legislation, provided that employee emails, chats, etc, are not accessed and monitored. If documentation is unrelated to electronic communications, it also may be reviewed by the employer. Laptops, paper archives and other similar company documentation considered "physical evidence" may be investigated while gathering evidence on the condition that any private documentation, communications, pictures or other content of an employee are not accessed.

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



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The starting position is that there is no general right for an employer to search an employee's possessions. However, an employer may be able to undertake a search in circumstances where:

- the employee consents to the search;
- there is a "right to search" contained in a contract, policy, procedure or industrial instrument; or
- the request to search constitutes a lawful and reasonable direction.

If an employee agrees to a search of their possessions, this consent should be confirmed in writing. If the employee does not consent then the employer can issue a direction to the employee. If the direction is lawful and reasonable, and the employee does not comply, then disciplinary action may be considered.

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Only the police can search employees' possessions (assuming that the prerequisites outlined in the legislation are met).

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



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A complaint will be a whistleblowing complaint where a complainant has reasonable grounds to suspect that the information they are disclosing about the organisation concerns misconduct or an improper state of affairs or circumstances. The information can be about the organisation or an officer or employee of the organisation engaging in conduct that:

- breaches the Corporations Act 2001 (Cth);
- breaches other financial sector laws;
- breaches any other law punishable by 12 months' imprisonment; or
- represents a danger to the public or the financial system.

Since 2020, all public companies, large proprietary companies and trustees of registrable superannuation entities in Australia are required to have a whistleblower policy. Employers conducting an investigation will need to follow the processes outlined in their policy.

One of the key differences when conducting an investigation that involves whistleblowing is identity protection and the ability of the whistleblower to disclose anonymously and remain anonymous.

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In respect of data protection, the processing of personal data in whistleblowing systems is considered by the Finnish Data Protection Ombudsman (DPO) as requiring a data protection impact assessment (DPIA).

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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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## 10. What confidentiality obligations apply during an investigation?



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Confidentiality protects the interests of the persons involved in the investigation as well as the integrity of the investigation. Before providing information as part of the investigation, employers should direct the complainant, respondent or witnesses to sign confidentiality agreements. This agreement should direct the person to refrain from discussing the investigation or matters that are the subject of the investigation with any person other than the investigator.

It is also best practice for participants in the investigation to be directed not to victimise (threaten or subject to any detriment) any persons who are witnesses to or are otherwise involved in the investigation.

After an investigation, employers should write to the complainant, respondent and any witnesses reminding them of their ongoing confidentiality obligations.

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Concerning a workplace investigation, there is no specific legislation in force at the moment regarding confidentiality obligations. All normal legal confidentiality obligations (eg, obligations outlined in the Trade Secrets Act (595/2018)), and if using an external investigator, the confidentiality obligations outlined in the agreement between the employer and the external investigator, apply. Attorneys-at-law always have strict confidentiality obligations as per the Advocates Act (496/1958).

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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].

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[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)

Last updated on 03/04/2023

## 11. What information must the employee under investigation be given about the allegations against them?



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To ensure procedural fairness, the allegations must be put to the respondent in writing in advance of the investigation interview. The allegations must be specific, but the respondent does not need to be provided with a copy of the original complaint. The respondent should also be informed that if the allegations are substantiated they may result in disciplinary action up to and including the termination of the employee's employment.

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The process must be transparent and impartial, and therefore all the information that may influence the conclusions made during the investigation should be shared with the employee.

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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.

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



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Employers will generally take steps to treat complaints sensitively and confidentially. However, because of the obligations employers have, confidentiality cannot be guaranteed as part of the investigation and the complainant, respondent and witnesses should be made aware of this.

Understandably, the complainant or witnesses may wish to remain anonymous. However, because the details of the allegations need to be put to the respondent so that they can provide an informed response or explanation, the source of the information will often need to be disclosed.

Employers can take steps to “ringfence” the investigation by asking employees to sign a confidentiality agreement. This will protect the interests of the participants of the investigation and uphold the integrity of the investigation.

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See question 11, there is no protection of anonymity as the process must be transparent to the parties involved.

Last updated on 15/09/2022



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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<sup>[4]</sup> 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<sup>[5]</sup>.

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.

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[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

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



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Non-disclosure agreements, also known as confidentiality agreements, can be used to maintain the confidentiality of the investigation. In this agreement, the employee will be directed to maintain confidentiality concerning the investigation and matters that are the subject of the investigation, and not speak to anyone outside the investigation team about the investigation without authorisation.

Confidentiality agreements are legal documents. Employees should be informed that a breach of the confidentiality agreement could result in disciplinary action being taken against them, up to and including termination of their employment.

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Yes, however, the need for an NDA is assessed always on a case-by-case basis.

Last updated on 15/09/2022



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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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## 14. When does privilege attach to investigation materials?



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Investigation materials are not privileged and an employer may be required to disclose them in subsequent legal proceedings. If an employer is concerned about privilege attaching to an investigation, they should engage a legal practitioner to facilitate the investigation.

Employers who are concerned about privilege attaching to investigation materials should also consider the method of a lawyer's engagement. The lawyer should be expressly engaged to investigate, report and to assist the employer by providing legal advice. Additional benefits can be achieved if the legal practitioner engages an external investigator to investigate the complaint and prepare the investigation report. Privilege will attach to the investigation materials because they are prepared for the lawyer to allow the lawyer to provide legal advice to the employer.

It is important that employers do not expressly or inadvertently waive privilege. For example, by disclosing the investigation report or substantial contents of the investigation report. It is a balance between providing information to the respondent and complainant about the outcome of the investigation and disclosing too much information.

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The privilege of investigation materials concerns a rather limited amount of cases. In practice, materials may be considered privileged in connection with the litigation process under the Procedural Code (4/1734). For example, communications between a client and an attorney may attract protection against forcible public disclosure.

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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<sup>[6]</sup>.

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.

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

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



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The respondent should be given the opportunity to have a support person present during the investigation meeting and any subsequent conversations that concern the termination of their employment. Failure to allow the respondent to have a support person may result in any subsequent termination of employment being found to be an unfair dismissal. This is because under the Fair Work Act 2009 (Cth), when the FWC is considering whether a dismissal is an unfair dismissal, they must consider any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.

Employers should request that the respondent inform them 48 hours before any meeting of the identity of their support person. This will allow the employer to confirm the support person's suitability. A support person can be a legal representative or trade union representative, but the role of a support person is limited to assisting the employee and they are not there to act as an advocate or representative.

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The employee under investigation has a right to have a support person present (eg, a lawyer or an employee representative) during the hearings and a right to assistance in preparing written statements.

Last updated on 15/09/2022



### Greece

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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.

Last updated on 03/04/2023

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



### Australia

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A trade union does not have any right to be informed of, or involved in, an investigation by an employer. However, an employee may request that their support person is a trade union member or trade union representative. This is appropriate and should be permitted.

Employers should review the terms of an employment contract, policy or industrial instrument as this may contain terms regarding trade union involvement. In particular, heavily-unionised workplaces may contain enterprise agreements which contain relevant clauses.

Last updated on 25/09/2023



### Finland

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A works council or a trade union does not have a role in the investigation.

Last updated on 15/09/2022



### Greece

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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<sup>[7]</sup> 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].

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

[8] Law 4808/2021 art.14

Last updated on 03/04/2023

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



### Australia

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Employers should be conscious that the investigation may have an impact on the complainant, respondent and witnesses. Employers will need to consider how to support their employees. The level of support provided will often depend on the size of the organisation and programmes already in place.

Many employers have an Employee Assistance Programme and employees should be reminded about this programme if further support or assistance is required. An employer's HR team may also be able to assist if an employee has concerns about the progress of an investigation.

Last updated on 15/09/2022



### Finland

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They can request assistance, for example, from an occupational health and safety representative, a shop steward or the occupational healthcare provider.

Last updated on 15/09/2022



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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<sup>[12]</sup>.

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<sup>[9]</sup> Law 4990/2022 art.17

<sup>[10]</sup> Law 4990/2022 art.19

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

<sup>[12]</sup> Law 4808/2021 art.13

Last updated on 03/04/2023

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



### Australia

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During the investigation, unrelated matters can come to light, usually made by the complainant or a witness during the interview process. Unrelated matters may take the form of further complaints against the respondent (but on grounds that are outside the scope of the current investigation), or entirely different complaints.

An employer should first assess the nature of the new allegations. Entirely unrelated matters should be dealt with separately. However, if the matter relates to the respondent it may be appropriate to obtain consent from the respondent and complainant for the scope of the investigation to be widened. It is important to remember that all allegations must be put to the respondent and they must be given an opportunity to respond.

Last updated on 15/09/2022



### Finland

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If they are related to the work or workplace, the employer will handle the emerging matters separately. In internal investigations, the employer is allowed to use any material legally available.

Last updated on 15/09/2022



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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.

Last updated on 03/04/2023

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



### Australia

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If a respondent raises a grievance during the investigation this should be dealt with under any employment contract, grievance policy or industrial instrument. This may involve investigating and responding accordingly. The content of the grievance should be carefully considered, but in many circumstances it is appropriate for the initial investigation to continue. Multiple investigations can be run simultaneously.

Last updated on 15/09/2022



### Finland

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If the nature of the grievance relates to the employer's obligations to handle such matters in general, the grievance will be investigated either separately or as a part of the ongoing investigation.

Last updated on 15/09/2022



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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.

Last updated on 03/04/2023

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



### Australia

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It is not uncommon for respondents to an investigation to take personal or carer's leave (sick leave) claiming that they are suffering from stress or anxiety. If this occurs, employers need to act appropriately, but this does not necessarily involve stopping the investigation process.

Employers should:

- assess the medical evidence to ascertain the respondent's condition and determine how long they are likely to be unwell;
- avoid exacerbating the condition;
- determine whether the employee is unfit to attend the investigation meeting;
- take into consideration the evidence of other witnesses;
- consider delaying the investigation for a short period; and
- consider conducting the interviews in other ways, for example, in writing.

While all efforts should be made to accommodate an employee who has taken personal or carer's leave during an investigation, if the respondent does not participate in the investigation, the investigation report may be prepared based on the available evidence.

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### Finland

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As a general rule, sick leave does not prevent an investigation from progressing. Depending on the nature of the sickness, the employee can attend hearings and take part in the procedure. If the sickness prevents the employee from participating, the employer can put the process on hold temporarily.

Last updated on 15/09/2022



### Greece

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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.

Last updated on 03/04/2023

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



### Australia

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There are circumstances of misconduct in the workplace that can also constitute criminal conduct and be subject to a criminal or regulatory investigation. This can include physical or sexual assault, theft, fraud, illegal drug use or stalking.

An employer can proceed with an investigation to determine whether the respondent engaged in misconduct on the balance of probabilities. The employer can terminate an employee's employment before the outcome of any criminal investigation. However, the employer must keep in mind that procedural fairness must be afforded to the employee, particularly in circumstances where an employee is awaiting the outcome of a court proceeding.

Alternatively, an employer may decide to suspend the employee pending the outcome of the criminal investigation. If a criminal act has been committed, then the employer may decide to terminate the employee's employment.

Co-operation with the police and regulatory authorities is sensible and evidence can be compelled by the police or regulators by, for example, a subpoena, search warrant or an order for production.

Last updated on 23/09/2023



### Finland

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Regardless of a possible criminal investigation, the employer must run its internal workplace investigation without unnecessary delay. A workplace investigation and a criminal investigation are two separate processes and can be ongoing simultaneously, so the criminal process does not require the workplace investigation to be stayed. Thus, parallel investigations are to be considered as two separate matters. The police may only obtain evidence or material from the company or employer if strict requirements for equipment searches are met after a request for investigation has been submitted to the police.

Last updated on 15/09/2022



### Greece

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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<sup>[13]</sup> 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.

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<sup>[13]</sup> Law 4808/2018 art.10

Last updated on 03/04/2023

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



### Australia

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Managing the outcome of the investigation is an important part of the process. The respondent must be informed of the outcome of the investigation as soon as possible after the investigation is completed and the decision-maker has decided how to proceed.

The investigator must decide whether the claims have been substantiated on the balance of probabilities and the decision-maker must decide what disciplinary action, if any, will be taken. Any disciplinary action should be proportionate to the seriousness of the misconduct. Disciplinary action could include a warning, counselling, monitoring of behaviour or termination of employment.

Ideally, the outcome of the investigation should be communicated to the respondent and complainant in writing, setting out the allegations that have been substantiated, unsubstantiated or whether there is insufficient evidence to make a finding.

Last updated on 15/09/2022



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The employer's conclusions from the investigation.

Last updated on 15/09/2022



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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.

Last updated on 03/04/2023

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



## Australia

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The investigator should prepare a written report setting out whether the allegations are substantiated, unsubstantiated or cannot be determined due to insufficient evidence. This report should be used for internal purposes only. Accordingly, the report should not be shared with the complainant, respondent or witnesses unless required by law, the employer's policies or another industrial instrument. It is particularly important not to share the investigation report should the employer wish to maintain privilege in respect of the report.

Last updated on 15/09/2022



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The employee under investigation may only be informed of the conclusions.

Last updated on 15/09/2022



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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.

Last updated on 03/04/2023

## 24. What next steps are available to the employer?



### Australia

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Employers must take steps to deal with the findings of the investigation and implement any recommendations promptly. This may involve commencing disciplinary action.

The complainant and respondent need to be informed of the outcome of the investigation. All witnesses who participated in the investigation should also be thanked for their contribution and advised that the investigation has been completed. All participants in an investigation should be reminded of their ongoing obligations concerning confidentiality and victimisation.

If an employer decides that it may be appropriate to terminate a respondent's employment, the employee must be provided with the opportunity to respond and to "show cause" as to why their employment should not be terminated.

The investigation report along with any other materials produced during the investigation should be kept in a separate confidential file.

Employers should also consider whether action should be taken at an organisational level to prevent future misconduct. In particular, employers are required to take a proactive approach to addressing systemic workplace cultural issues in relation to sex discrimination, sexual harassment and victimisation.

Last updated on 25/09/2023



### Finland

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The employer decides whether misconduct has taken place or not. Depending on the case, the employer may recommend a workplace conciliation in which the parties try to find a solution that can be accepted by both sides. The employer may choose to give an oral reprimand or a written warning. If the legal conditions are met, the employer may also terminate the employment agreement.

Last updated on 15/09/2022

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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.

Last updated on 03/04/2023

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

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The outcome of the investigation must be disclosed to the complainant and respondent. If there is a concurrent police or regulatory investigation, they may request a copy of the investigation report. Employers should generally cooperate with regulatory authorities, but should be careful about disclosing the investigation report as this may be privileged and privacy obligations must be considered. Employers should consider only disclosing the investigation findings and interview records if compelled to do so by regulators or police.

Interview reports, the investigation report and communications about the investigation should be kept in a separate file. The file should be marked confidential and access to the file should be restricted.

If proceedings are commenced, the investigation materials may be subject to disclosure unless legal professional privilege can be asserted, see above.

Last updated on 15/09/2022

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In general, investigation materials, including findings, that includes personal data should only be processed by the personnel of the organisation who are responsible for internal investigations. However, it may in some situations be required by applicable legislation that findings are disclosed to competent authorities for the performance of their duties, such as conducting investigations in connection with malpractice and violations of the law.

## Greece

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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.

Last updated on 03/04/2023

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

### Australia

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There are legal requirements related to the time you must keep certain employee records in Australia, such as pay slips and time sheets. However, there are no laws concerning disciplinary records.

Employers can rely on previous misconduct to justify an employee's termination of employment where it can be shown it is part of a course of conduct. Accordingly, if complaints have been substantiated, and disciplinary action has been taken, these records should be maintained. However, if a significant period has elapsed since the misconduct, an employer should carefully consider whether it is appropriate to rely on this past behaviour to justify future disciplinary action for similar conduct.

Last updated on 15/09/2022

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Please see question 7. The outcome of the investigation involving personal data may be retained only for as long as is necessary considering the purposes of the processing. In general, the retention of investigation-related data may be necessary while the investigation is still ongoing and even then the requirements of data minimization and accuracy should be considered. The data concerning the outcome of an investigation should be registered to the employee's record merely to the extent necessary in light of the employment

relationship or potential disciplinary measures. In this respect, the applicable retention time depends on labour law-related rights and limitations, considering eg, the applicable periods for filing a suit.

Last updated on 15/09/2022

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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.

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[14] L.4990/2022 art.16 par.1

Last updated on 03/04/2023

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

### Australia

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It is important for employers to conduct procedurally fair investigations that result in a fair outcome. Failure to do so may expose the employer to various claims by an employee. The most common type of claim following an investigation is an unfair dismissal claim. If a respondent's employment is terminated because of an investigation, they may be eligible to bring an unfair dismissal claim in the FWC alleging their dismissal was harsh, unjust or unreasonable.

An employee may also bring a bullying, discrimination or general protections claim. These claims may be made even where the investigation does not result in the employee's dismissal.

If an employer has departed from the procedures set out in their policies, or they have not followed the terms of an employee's employment contract or another applicable industrial instrument then an employee may bring a claim for breach of contract.

Australia has also recently introduced the "Respect@Work" legislation which places a positive obligation on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. Accordingly, an employer who is not perceived to have taken a proactive and fair approach to these workplace issues faces significant legal exposure.

Failure to conduct an investigation properly (or a failure to conduct an investigation in circumstances where it is needed) can also cause significant reputational and financial risk.

Last updated on 25/09/2023

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There are no regulations regarding the actual investigation process. Therefore, the employer cannot be accused of procedural errors as such. However, once the matter has been adequately investigated, the employer must decide whether or not misconduct has taken place. If the employer considers that misconduct has taken place, the employer must take adequate measures for remedying the situation. Failure to adequately conduct the investigation could result in criminal sanctions being imposed on the employer as an organisation or the employer's representative, or damages.

Last updated on 15/09/2022

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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.

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[\[15\]](#) L.4990/2022 art.23 par.1

Last updated on 03/04/2023

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