

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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11. What information must the employee under investigation be given about the allegations against them?

Greece

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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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Switzerland

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As a result of the employer's duty of care (article 328, Swiss Code of Obligations), employees under investigation have certain procedural rights. These include, in principle, the right of the accused to be heard. In this context, the accused has the right to be informed at the beginning of the questioning about the subject of the investigation and at least the main allegations and they must be allowed to share their view and provide exculpatory evidence.^[1] The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.^[2]

Covert investigations in which employees are involved in informal or even private conversations to induce them to provide statements are not compatible with the data-processing principles of good faith and the requirement of recognisability, according to article 4 of the Swiss Federal Act on Data Protection.^[3]

Also, rights to information arise from the Swiss Federal Act on Data Protection. In principle, the right to information (article 8, Swiss Federal Act on Data Protection) is linked to a corresponding request for information by the concerned person and the existence of data collection within the meaning of article 3 (lit. g), Swiss Federal Act on Data Protection. Insofar as the documents from the internal investigation recognisably relate to a specific person, there is in principle a right to information concerning these documents. Subject to certain conditions, the right to information may be denied, restricted or postponed by law (article 9 paragraph 1, Swiss Federal Act on Data Protection). For example, such documents and reports may also affect the confidentiality and protection interests of third parties, such as other employees. Based on the employer's duty of care (article 328, Swiss Code of Obligations), the employer is required to protect them by taking appropriate measures (eg, by making appropriate redactions before handing out copies of the respective documents (article 9 paragraph 1 (lit. b), Swiss Federal Act on Data Protection)).^[4] Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9 paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

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

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

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

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

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



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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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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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