

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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01. What legislation, guidance and/or policies govern a workplace investigation?

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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Nigeria

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- The Constitution of the Federal Republic of Nigeria, 1999 (as amended)
- The Criminal Code Act
- Penal Code Law
- Money Laundering (Prohibition) Act 2011 (as amended)
- Freedom of Information Act 2011
- Terrorism (Prevention) Act 2013
- Independent Corrupt Practices and other related offences Act 2000
- Code of Conduct Bureau and Tribunal Act
- Companies and Allied Matters Act 2020
- Nigerian Code of Corporate Governance 2018
- Economic Financial Crime Commission (Establishment) Act 2004
- Investment Securities Act 2007
- Central Bank of Nigeria Act 2007
- Banks and Other Financial Institutions Act 2020
- Whistleblowing Programme under the Ministry of Finance



Portugal

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Pursuant to article 98 of the Portuguese Labour Code, the employer has a disciplinary power over its employees during the employment period. This is enforced through the initiation of disciplinary procedures – which can include a preliminary workplace investigation as provided for in article 352(1) of the Portuguese Labour Code – and ultimately the application of sanctions laid down by law or in an applicable collective bargaining agreement.

The Portuguese Labour Code governs disciplinary procedures, which can include a preliminary workplace investigation, in two different sections. On the one hand, articles 328 to 332 establish general rules regarding the imposition of disciplinary sanctions; statutory deadlines and statutes of limitations involved; decision criteria; penalties; and disciplinary records. On the other hand, articles 351 to 358 lay down the rules applicable to dismissals with cause, which are also widely understood to be applicable concerning conservatory sanctions (i.e. those that enable the continuity of the employment relationship).

Additionally, collective bargaining agreements may provide for different disciplinary penalties, as long as the rights and guarantees of employees are not impaired.

Workplace investigations must also abide by the general rules laid down in the Portuguese Constitution, Portuguese Civil Code and Data Protection Laws (including guidelines issued by the Data Protection Agency), as regards the personal rights of the employees.

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02. How is a workplace investigation usually commenced?



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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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Nigeria

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A workplace investigation is conducted to verify alleged misconduct within a workplace.^[1] Once a

complaint is made regarding wrongdoing, misconduct or unethical behaviour by an employee or group of employees within a workplace, an investigation is required to confirm the complaint and if it is confirmed, the body in charge of supervising the employees (usually the HR specialist, disciplinary committee or line managers) determine and implement necessary corrective or disciplinary actions.

[1] [Conducting Internal Investigations In Organisation - Health & Safety - Nigeria \(mondaq.com\)](#)

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Having been informed of an alleged infraction committed by an employee, the employer must prepare a detailed written accusation and notify the employee.

Moreover, if the alleged infraction constitutes gross misconduct and the employer is considering dismissal, a formal statement of the employer's intention to dismiss the employee should accompany the accusation. If this is not expressly done, the employer will be unable to dismiss the employee and may only apply one of the conservatory sanctions. A copy of these documents must be sent to the works council, if any, and, should the employee be a union member, to the respective trade union.

Notwithstanding this, if before preparing the accusation the employer needs to further investigate the facts and circumstances, it may open a preliminary investigation aimed at collecting all the facts and circumstances and conclude if there are grounds to bring an accusation against the employee.

The preliminary investigation must start within 30 days of the employer becoming aware of the facts, be diligently carried out (but with no maximum period laid down by law) and concluded within 30 days of the last investigatory act. Furthermore, the preliminary investigation will suspend the relevant statutory deadlines and statutes of limitations (ie, 60 days from the date of acknowledgment, by the employer or a supervisor with disciplinary power, of the facts to enforce disciplinary action against the employee and one year from when the facts occurred, regardless of the employer's acknowledgment, unless the infraction also constitutes a criminal offence, in which case the longer statutes of limitation established in criminal law will apply).

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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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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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Yes, an employee can be suspended during an investigation to allow the employer to investigate the allegations against the employee unhindered and without undue interference by that employee. A suspension under the law merely prevents the employee from discharging the ordinary functions of his or her role without any deprivation of his rights during the period of the suspension. Thus, unless there is an express provision in the contract of employment or employee's handbook stating that the employee can be suspended with or without half pay, the employee would be entitled to a full salary.

Further, the duration for which the employee may be suspended should be as contained in the employee's contract, employee's handbook, or letter of suspension.

In the recent case of *GLOBE MOTORS HOLDINGS NIGERIA LIMITED v. AKINYEMI ADEGOKE OYEWOLE (2022)*, the court held, *"Since suspension is not a termination of the employment contract nor a dismissal of the employee, the implication is that the employee is still in continuous employment of the employer until he is recalled or formally terminated or dismissed. Pending his recall or dismissal, a suspended employee is entitled to his wages or salary during the period of suspension, unless the terms of the contract of employment or the letter of suspension itself is specific that the suspended employer will not be paid salaries during the period of suspension"*.

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After the employee is notified of the accusation, the employer may decide on a preventive suspension of the employee if the employee's presence on company premises is deemed problematic. In this case, the employee's salary will continue to be paid.

As per article 330(5) of the Portuguese Labour Code, a preventive suspension may also be determined during the 30 days before the accusation is made, provided that the employer, in writing, justifies why is necessary (eg, for interfering with the inquiry) and why the accusation cannot be served at that moment.

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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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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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Nigeria

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Typically, the legal department, the chief compliance officer, the HR manager, the audit committee or any other committee as may be set up by the company may conduct a workplace investigation. However, in other instances, the company may engage the services of independent external personnel to assist with conducting an internal investigation.

The minimum qualification or criteria of the person conducting the investigation should be as contained in the relevant company policies. Criteria may include independence, objectivity and impartiality.

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According to article 356(1) of the Portuguese Labour Code, the employer can appoint an instructor, who shall be responsible for the probationary proceedings. Usually, workplace investigations are conducted by external advisors (eg, lawyers), appointed by the employer.

However, regarding disciplinary powers, there is a legal limitation in article 98 of the Portuguese Labour Code. As such, only the employer (or the immediate superior of the concerned employee, if the employer has delegated its powers, as per article 329(4) of the Portuguese Labour Code) has disciplinary powers.

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

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Generally, issues surrounding workplace investigations are usually embedded in either the employee's contract or handbook, which is binding on the employee. Thus, an employee cannot validly bring an action to stop the investigation unless his rights as guaranteed by the Constitution, the Employee's handbook, and other laws such as a right to a fair hearing are violated during the investigation.

Consequently, the employee may apply to the National Industrial Court for an order of interim relief against his or her employer restraining further prejudicial investigation.

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The employee under investigation can only bring legal action after the investigation is finished and if the employer has applied a disciplinary sanction.

According to article 329(7) of the Portuguese Labour Code, the employee may submit a complaint to the immediate superior officer that applied the sanction or may resort to a dispute resolution procedure as provided for by the applicable collective bargaining agreements or the law (this is uncommon, however).

Furthermore, should a company dismiss an employee in breach of the legal requirements described above, the latter may take legal action against the company within 60 days of the date of termination of his or her employment agreement. The employee may also choose to file a preliminary injunction against the employer seeking immediate (albeit provisional) reinstatement.

Notwithstanding this, if the employee can prove that they suffered damages as a result of being subject to an abusive and illegal investigation, they may file a complaint with the Labour Authorities or bring a claim against the employer and demand the payment of compensation for the damages caused.

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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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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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The employee's contract, employee handbook or company policies typically mandate an employee to cooperate and participate in good faith in any lawful internal investigation undertaken by the company, and also protects an employee acting as a witness in an internal investigation. Some of the legal protections available to an employee acting as a witness during workplace investigations are freedom from intimidation, threats or the loss of employment.

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Portugal

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If the employer decides on an internal investigation to assess potential wrongful actions carried out within the company, employees must cooperate. However, employees are entitled to the privilege against self-incrimination established in the Portuguese Criminal Code, according to which individuals are not obliged to self-report.

An employee's refusal to cooperate with an internal investigation may be regarded as a breach of conduct by the employer and, ultimately, may lead to disciplinary sanctions.

Employees who act as witnesses in cases of harassment cannot be sanctioned unless they acted with wilful misconduct, and any sanction applied to an employee who acted as a witness in a harassment procedure will be presumed to be abusive.

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07. What data protection or other regulations apply when gathering physical 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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When gathering evidence, the person being investigated is protected by the Constitution, the Freedom of Information Act and the Nigerian Data Protection Regulation (NDPR), among others.

The Constitution, particularly section 37, guarantees the right of a person to privacy.

The NDPR is the main data protection regulation in Nigeria. It regulates the processing and transfer of personal data.

Further, the Freedom of Information Act, 2011 prohibits the disclosure of information gathered during an investigation to the public.

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Portugal

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Whenever employers process personal data in the course of an investigation, they need to comply with Regulation (EU) 2016/679 (the GDPR) and Law 58/2019, which implements the GDPR in Portugal (jointly the Data Protection Regulations). If the gathering of physical evidence includes the collection and processing of sensitive data (eg, related to the employee's health or any other category outlined in article 9 of the GDPR), additional safety measures should be in place to safeguard the adequate and confidential nature of such information.

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

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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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Nigeria

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Yes, an employer can search the possessions or files of an employee as part of an investigation where the employee's contract or handbook authorises such a search and there is a reasonable suspicion of wrongdoing.

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Portugal

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The employer is allowed to search an employee's possessions or files, provided that they are work instruments or of a professional nature.

When performing these searches, employers should consider the specific provisions of the Data Protection Regulations as well as Resolution No. 1638/2013 of the Portuguese Data Protection Authority (CNPD), which contains rules on monitoring phone calls, e-mail and internet usage by employees. The CNPD understands that for the employer to access the employees' professional data (e-mails, documents and other information stored on electronic devices), the latter should be present during the monitoring, to identify any information of a personal nature that should not be accessed by the employer (the employer must comply with these directions and should not access that email). In addition, review of the data should respect specific protocols to avoid potential access to personal data (eg, review of subject, recipients, data flow and type of files attached).

Body searches or the seizure of personal belongings or documents belonging to the employee are not permitted within the scope of a disciplinary procedure.

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

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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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Consideration must be given to the confidentiality or anonymity of the whistleblower, when an investigation involves whistleblowing.

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The treatment of whistleblowers and their reports is laid down in various specific laws in Portugal.

Law 93/2021

Under Law 93/2021, a whistleblower of work-related offences must not be retaliated against. Furthermore, imposing disciplinary penalties on the whistleblower within two years after their disclosure is presumed to be abusive. The whistleblower is entitled to judicial protection and may benefit from the witness protection programme within criminal proceedings. Additionally, reports will be recorded for five years and, where applicable, personal data that is not relevant for the handling of a specific report will not be collected or, if accidentally collected, will be deleted immediately.

Corruption and Financial Crime Law (Law 19/2008)

Under Law 19/2008, a whistleblower must not be hampered. Furthermore, the imposition of disciplinary penalties on a whistleblower within one year following the communication of the infraction is presumed to be unfair.

Additionally, whistleblowers are entitled to:

- anonymity until the pressing of charges;
- be transferred following the pressing of charges; and
- benefit from the witness protection programme within criminal proceedings (remaining anonymous upon the verification of specific circumstances).

Money Laundering and Terrorism Financing Law (Law 83/2017)

Law 83/2017, which sets forth the legal framework to prevent, detect and effectively combat money laundering and terrorism financing, applies to financial entities and legal or natural persons acting in the exercise of their professional activities (eg, auditors and lawyers)(collectively, obliged entities).

According to article 20 of Law 83/2017, individuals who learn of any breach through their professional duties must report those breaches to the company's supervisory or management bodies. As a result, the obliged entities must refrain from threatening or taking hostile action against the whistleblower and, in particular, unfair treatment within the workplace. Specifically, the report cannot be used as grounds for disciplinary, civil or criminal action against the whistleblower (unless the communication is deliberately and clearly unjustified).

Legal Framework of Credit Institutions and Financial Companies (RGICSF)

Credit institutions must implement internal-reporting mechanisms that must guarantee the confidentiality of the information received and the protection of the personal data of the persons reporting the breaches and the persons charged. Under article 116-AA of RGICSF, persons who, while working in a credit institution, become aware of:

- any serious irregularities in the management, accounting procedures or internal control of the credit institution; or
- evidence of a breach of the duties set out in the RGICSF that may cause any financial imbalance, must communicate those circumstances to the company's supervisory body.

These communications cannot, per se, be used as grounds for disciplinary, criminal or civil liability actions brought by the credit institution against the whistleblower.

Moreover, article 116-AB of the RGICSF establishes that any person aware of compelling evidence of a breach of statutory duties may report it to the Bank of Portugal. Such communications cannot, per se, be used as grounds for disciplinary, criminal or civil liability actions brought by the credit institution against the whistleblower, unless the report is clearly unfounded.

The Bank of Portugal must ensure adequate protection of the person who has reported the breach and the person accused of breaching the applicable duties. It must also guarantee the confidentiality of the persons who have reported breaches at any given time.

Portuguese Securities Code (CVM)

Article 382 of the CVM states that financial intermediaries subject to the supervision of the Portuguese Securities Market Commission (CMVM), judicial authorities, police authorities, or respective employees must immediately inform the CMVM if they become aware of facts that qualify as crimes against the securities market or the market of other financial instruments, due to their performance, activity, or position.

Additionally, according to article 368-A of the CVM, any person aware of facts, evidence, or information regarding administrative offences under the CVM or its supplementary regulations may report them to the CMVM either anonymously or with the whistleblower's identity. The disclosure of the whistleblower's identity, as well as that of their employer, is optional. If the report identifies the whistleblower, their identity cannot be disclosed unless specifically authorised by the whistleblower, by an express provision of law or by the determination of a court.

Such communications may not be used as grounds for disciplinary, criminal, or civil liability action brought against the whistleblower, and they may not be used to demote the employee.

According to article 368-E of the CVM, the CMVM must cooperate with other authorities within the scope of administrative or judicial proceedings to protect employees against employer discrimination, retaliation or any other form of unfair treatment by the employer that may be linked to the communication to the CMVM. The whistleblower may be entitled to benefit from the witness-protection programme if an individual is charged in criminal or administrative proceedings because of their communication to the CMVM.

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10. What confidentiality obligations apply during an investigation?



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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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Nigeria

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Workplace investigations should be kept strictly confidential to protect the parties involved in the investigation from victimisation. Some of the confidential obligations that apply during investigations are the identities of the parties involved in the process (whether as a complainant, respondent or witnesses), the confidentiality of reports, recordings and other documents generated or discovered during the investigation, as well as attorney-client privilege between the employee and his or her attorney, provided that such privilege is within the bounds of the law.

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Portugal

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The Portuguese Labour Code does not specifically provide for any confidentiality obligations concerning disciplinary procedures. On the contrary, it states that the employee should have access to any information included in the disciplinary procedure. Otherwise, the employee's defence rights could be jeopardised, which would make the disciplinary procedure (and possible disciplinary sanctions) null and void.

As for the witnesses, even though there is no specific provision on confidentiality, employees are generally bound by a duty of loyalty vis-a-vis the employer, which includes not disclosing information that should be kept reserved,

However, in the cases of whistleblowing, it is mandatory to ensure the confidentiality of the complainant, as per question 9.

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

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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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An employee must be given the full details of the allegations against him or her to enable the employee to make adequate representations against the complaints made against him or her.

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If, before taking disciplinary action, the employer decides to open a preliminary investigation phase, the employee does not have to be informed.

Only when the preliminary investigation leads to a formal accusation will the employee be entitled to know that enquiries were carried out and the source of the facts (eg, witnesses, documents).

However, if an employer does not need to open a formal preliminary investigation phase, it only has to serve the accusation notice to the employee.

As a rule, employees will only know that they are being investigated if they are suspended or when they are notified of the accusation.

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

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Nigeria

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Typically, the identities of the complainant, witnesses and sources of information for the investigation are kept confidential.

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An employee served a notice of accusation is entitled to assess all information that was gathered within the scope of the investigation and disciplinary procedure (notably the identity of the complainant, witnesses heard, other sources of information, etc), otherwise his right of defence may be jeopardised.

Where a preliminary investigation does not lead to an accusation against the employee, no disclosure has to be made by the employer.

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

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

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NDAs are usually part of an employee's contract and, as such, create a contractual obligation between the parties privy to it. However, where the subject matter of an investigation borders on matters of a criminal nature, it might be impossible for parties to the NDA to continually uphold the obligation under the NDA because the parties have an obligation to the state to disclose facts of a criminal nature.

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Please see question 12 above. NDAs are not admissible.

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14. When does privilege attach to investigation materials?

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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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Privilege attaches to investigation materials when a legal practitioner facilitates the internal investigation. Documents prepared during a workplace investigation will not automatically attract legal professional privilege, unless the investigation is facilitated by a legal practitioner.

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If any sources of information used within an investigation include privileged data, they may be redacted to safeguard third parties' rights. However, where disclosure of that data is necessary for the employee to understand why he or she is being accused, it may be necessary to reveal those elements. Otherwise, the employee may argue that their rights were affected and, for that reason, the disciplinary procedure – and any possible sanction – should be deemed null and void.

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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 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.

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The Constitution guarantees the right of every person to legal representation during investigations and interrogations by law enforcement agencies. However, our labour legislation is silent on whether an employee has a right to be accompanied or have legal representation during an investigation. Whether an employee has a right to legal representation will depend on the policy of the employer as well as the nature of the interrogation.

In practice, an employee is usually not accompanied or represented legally during an investigation. However, unless it is stipulated in the employee's policy, nothing prohibits the employee from being accompanied or represented legally during an investigation.

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Under the Portuguese Bar Association statutes, the assistance of a lawyer is allowed at all times and cannot be prevented by any jurisdiction or authority, public or private entity.

Nevertheless, the law does not provide any obligation to inform the employee that they are entitled to the assistance of a lawyer.

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

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The law is silent on whether a member of a trade union has the right to be informed or involved in the investigation. Typically, this is dependent on the employee's contract, handbook or other policies of the employer.

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Employee representative bodies are not entitled to be informed about or to participate in the preliminary investigation. The works council is only entitled to participate in disciplinary proceedings after a formal accusation has been made against the employee.

A copy of the accusation should be sent to the works council (if any) and if the employee is a trade union member, to the respective trade union. After the instruction phase of the procedure has ended (where the employer has to hear the witnesses identified by the employee in his written defence and file any other sources of information that have been requested), the employer should provide a copy of the disciplinary procedure to the works council (if any) and the respective trade union, if the employee is a member. These employees' representatives will then have five business days to issue their opinion on the matter.

Finally, a copy of the final decision must also be sent to these bodies.

There is no legal right for the interviewee to be assisted by a representative from the works council.

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

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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.

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An employee being investigated has a right to be heard before a decision being made by the employer. Further, the body responsible for investigating the employee must be independent, so as not to be considered biased.

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Employees are usually assisted by lawyers when they are subject to an investigation or disciplinary procedure.

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

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

Nigeria

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Where unrelated matters are revealed as a result of the investigation, the body investigating the employee is expected to inform the employee of the new matters and give him adequate time to respond.

However, there are exceptional cases where a crime is revealed during an investigation. In such instances, the employer is required to report its findings to the police for investigation and possible prosecution.

Last updated on 15/09/2022

Portugal

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If new facts arise as a result of the investigation and they are relevant, the employer may include them in the accusation. If, however, the new facts are revealed after the accusation has been served, the employer will have to prepare an addendum to the initial accusation and the employee will be able to use the same defence rights against that addendum.

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

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

Nigeria

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It is not unusual for an employee under investigation to raise a grievance during the investigation. This grievance may be on the same subject matter as the complaint being investigated or may disclose new facts outside the scope of the matter being investigated.

Where the issue discloses new facts, the employer is required to investigate those facts without suspending the investigation. However, where the grievance relates to the same subject matter as the complaint being investigated, the employer may either suspend the investigation to allow the investigation to recognise the grievance and the complaint against the employer or proceed with the investigation while noting that the matter disclosed is being or will be investigated.

Last updated on 15/09/2022

Portugal

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Grievance procedures are not specifically provided for under Portuguese law. There is no formal procedure for an employee to raise a complaint against the employer. Nonetheless, a potential claim brought by the employee under investigation and subject to a disciplinary procedure should not have any impact.

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

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.

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Nigeria

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The investigation would be suspended until the employee returns from sick leave. The investigation will immediately restart upon the return of the employee.

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Portugal

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The employer will be able to proceed with the investigation or disciplinary procedure regardless, although if it is necessary to hear the employee and they are unable to attend the interview, either the employer waits for their return or it could also send a written questionnaire for the employee to complete.

Last updated on 15/09/2022

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

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

Nigeria

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Where an employee has committed misconduct at work that is also the subject of a police investigation, the employer can conduct its own investigation and does not have to await the outcome of the criminal proceedings. The Supreme Court, in the case of *Dongtoe v CSC Plateau State* (2001), held that it is preposterous to suggest that the administrative body should stay its disciplinary jurisdiction over a person who had admitted criminal offences.

Further, the police or regulator may compel the employer to share evidence with it in the interests of justice.

Last updated on 15/09/2022

Portugal

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These procedures are independent and autonomous, and the law does not provide any particular rules to ensure coordination. This raises particular concerns when an employee is subject to a criminal investigation in secret, as the employer will be unable to access any evidence from the criminal procedure to begin an internal investigation or disciplinary procedure against the employee.

On the other hand, considering the short statutes of limitation to enforce disciplinary action, it may prove impossible to wait for the outcome of the criminal or regulatory investigation to decide if a disciplinary procedure should also be enforced, because by the time the employer is fully aware of the facts, the statutes of limitation may have already expired.

However, both the judge in a criminal procedure and the regulator have the public authority to order the employer to share any findings within the scope of the investigation or disciplinary procedure.

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

Finland

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The employer's conclusions from the investigation.

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Nigeria

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The employee under investigation must be informed of the outcome of the investigation as soon as a decision is reached.

Last updated on 15/09/2022

Portugal

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If, further to the conclusion of the investigation, the employer concludes that there are no grounds to enforce disciplinary action against the employee, the employee does not even have to know that they were the subject of an investigation.

However, if the employer does decide to accuse the employee, the employee will be entitled to all the sources of information obtained during the preliminary investigation.

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

Finland

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

Last updated on 15/09/2022

Nigeria

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The employer needs to balance the interests of the employee investigated, and the interests of other persons involved in the investigation such as the complainant and witnesses. Thus, the employer may either share the findings of the investigation or the full investigation report, provided that the identities of all other persons involved in the investigation are kept confidential.

Last updated on 15/09/2022

Portugal

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If the employee is accused by the employer, they will be entitled to consult the entire investigation report and not just the findings, as well as the witnesses' depositions, which should be in writing, and any other sources of information that were used by the employer

Even though the law is silent in this respect, courts have ruled that if this is not complied with, the employee's right of defence would be deemed to be disrespected.

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24. What next steps are available to the employer?

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.

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Nigeria

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Upon the completion and receipt of the findings of the investigation, the employer may affirm the employee's innocence or take disciplinary action against them.

Last updated on 15/09/2022

Portugal

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Once the preliminary investigation ends, the employer must decide whether or not, in its view, there are grounds to bring an accusation against the employee and enforce disciplinary action or if it should be dismissed due to a lack of evidence.

When the employer decides to enforce disciplinary action, the following sanctions may be applied:

- verbal warning;
- written warning;

- financial penalty;
- loss of holiday;
- suspension with loss of pay and length of service;
- dismissal with cause and without compensation.

The first five penalties are usually called conservatory sanctions, enabling the continuity of the employment relationship, as opposed to dismissal, which is deemed a measure of last resort.

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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?

Finland

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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.

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Nigeria

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Investigation findings may be disclosed to the employee and every other person having an interest in the investigation. Where it is discovered that a crime has been committed, the investigation findings may be disclosed to the regulators or police.

Typically, interview records are kept private and will not be disclosed unless it is interest of justice.

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Portugal

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The investigation findings must be disclosed to the employee when an accusation is brought against him or her and to the works council (if any) or trade union, if the employee is a member.

Regulators or police authorities may also notify the employer if any investigations were brought against a

particular employee (as regards regulators, this could occur within the scope of fit and proper procedures), in which case the employer must cooperate and disclose any investigation findings.

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

Finland

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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

Nigeria

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The law does not provide for the time the outcome of the investigation may remain on the employee's record. However, this will depend on the employer's record-retention policies, which must comply with applicable data protection laws.

Last updated on 15/09/2022

Portugal

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There are no specific rules in the Portuguese Labour Code on this matter.

However, article 332 of the PLC states that the employer should keep an updated record of disciplinary sanctions, so the competent authorities can easily verify compliance with applicable provisions. Accordingly, it is advisable to maintain a record of disciplinary sanctions during the entire employment relationship.

Also, please note that some collective bargaining agreements state that the disciplinary register must be deleted from the employee's record periodically.

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

Finland

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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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- Violation of Fundamental Rights of the Employee
- Breach of Contract of Employment or wrongful termination

Last updated on 15/09/2022

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If the disciplinary procedure recommends an employee's dismissal

Should a company dismiss an employee that has breached legal requirements, the latter may take action against the company within 60 days of the date of termination of their employment agreement.

If this action results in a ruling of unfair dismissal, the employee will be entitled:

- to receive all the payments they should normally have earned (back pay, including salary, holidays, legal subsidies, etc), from the month preceding the commencement of the lawsuit and until the final ruling of the court, minus any amounts they may have received during the same period and they would otherwise not have received; and
- to be reinstated in their former position or at the employee's choice, to receive an indemnity that the court will calculate as between 15 and 45 days of base salary (and service bonuses) for each full year of service or fraction thereof, with a minimum limit of three months' compensation.

This graduation will depend on the amount of the base salary (the lower the base salary, the higher the indemnity) and the severity of the company's conduct. Additionally, the employee is entitled to claim an indemnity for further damages.

There are, however, two exceptions to the above: the first relates to high-ranking employees (ie employees

carrying out management duties); the second refers to micro-companies (ie, a company that registered an average number of employees in the preceding calendar year below 10). In these two cases, the employer may oppose the employee's option for reinstatement, arguing that it would be gravely harmful to the company's activity. From a practical perspective, opposition to reinstatement is not commonly decided by the courts.

Finally, should the court rule that the grounds for dismissal were valid, but the investigation was found to have been irregular, the dismissal will be deemed valid, but the employee will still be entitled to an indemnity of 7.5 to 22.5 days of base salary (plus service bonuses, if any) per year of service.

If the disciplinary procedure does not recommend dismissal, but the application of a conservatory sanction

In this event, the employee can challenge the application of the sanction through the filing of a lawsuit against the company. Although the law is not entirely clear, there are court rulings stating that the employee has one year to bring a lawsuit, but others consider that the statute of limitation to challenge a conservatory disciplinary sanction is also one year from the termination of the employment agreement when a pecuniary penalty or suspension was applied to the employee.

Moreover, according to article 331(3) of the Portuguese Labour Code, the employer who applies an unjustified conservatory penalty should compensate the worker under the terms set out in paragraphs 5 and 6 of said article. The imposition of an abusive penalty is also considered a very serious administrative offence as per article 331(7). Please note that the Portuguese Labour Code considers a penalty to be unjustified if its imposition is motivated by the following:

- the employee lawfully complaining about their labour conditions;
- the employee lawfully disobeying unlawful orders from a superior;
- the employee being a member of any employee representative structure or having been a candidate for such a position; and
- the employee exercising or invoking their rights and guarantees.

Furthermore, any penalty imposed within six months of any instance listed above (or within one year if the invoked rights are related to equality and non-discrimination) is presumed to be abusive.

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