

Workplace Investigations

Contributing Editors

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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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France

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No specific rules directly govern a workplace investigation in the event of employee misconduct. However, several rules, both legal and administrative, affect the conduct of such an investigation. In addition, codes of conduct, internal regulations or guidelines may also exist within companies.

A new law (No. 2022-401) came into effect on 1 September 2022 and constitutes one of the cornerstones for future regulation of workplace investigations. This law transposes into French law the European directive relating to whistleblower protection. It does not, however, constitute a revolution, as a previous French law dated 9 December 2016 (the so-called Sapin 2 Law) already provided the whistleblower with a specific status and protection. These laws are fundamental when considering an internal investigation as the rules protecting the whistleblower and requiring the establishment of an internal whistleblowing channel (eg, a dedicated email or hotline) affect the degree of flexibility available to companies in conducting the investigation.

A new decree has been adopted (No. 2022-1284), dated 3 October 2022, for application of these new provisions. This decree sets out several obligations relating to the internal whistleblowing reporting

process. The reporting channel will necessarily contribute to shape the internal investigation triggered by situations which have been reported by that channel. Companies subject to this decree may define the reporting procedure using the supporting tool of their choice (company collective agreement, internal memorandum, etc.), as long as the employee representative bodies are duly consulted on the matter. The decree also specifies that an acknowledgement of receipt of the alert must be provided to the author of the alert in writing within seven days from the company receiving the alert. The author of the alert must also be informed in writing, within a reasonable period not exceeding three months from acknowledgement of receipt of the alert, of the measures envisaged or taken to assess the accuracy of the allegations and, where appropriate, to remedy the situation which had been reported, as well as the reasons for these measures and, finally, the closure of the case.

More generally, not only do all the “pure” labour law rules relating to the protection of the human rights of employees need to be complied with (right to privacy, data protection under the GDPR, etc), but also the disciplinary rules and regulations that protect employees from unfounded sanctions imposed by their employer. For example, an employer can only sanction an employee's misconduct if the disciplinary procedure begins within two months of when the misconduct was committed or when the employer becomes aware of it. In this respect, an internal investigation can be necessary for the employer to obtain full knowledge of the facts alleged to have been committed by the employee. It is nonetheless recommended that the internal investigation be completed within these two months to avoid the risk of the disciplinary action being time-barred.

Administrative rules produced by the French anti-corruption agency should also be taken into consideration (good practice, guidelines and recommendations relating to senior management's commitment to implement anti-corruption measures, corruption risk mapping, corruption risk management measures and procedures), as well as the guidelines produced by the French Ministry of Employment relating to the prevention of sexual harassment and gender-based violence or the recommendations of the Human Rights Defender, which is a French special institution aimed at protecting fundamental rights.

When the investigation in question concerns moral or sexual harassment or violence in the workplace, the national interprofessional agreement of 26 March 2010 should be referred to. This text stipulates that in the event of an investigation procedure, it should be based on, but not limited to, the following guiding principles:

- it is in everyone's interest to act with the discretion necessary to protect everyone's dignity and privacy;
- no information, unless it is anonymized, should be divulged to parties not involved in the case in question;
- complaints must be investigated and dealt with without delay;
- all parties involved must be listened to impartially and treated fairly;
- complaints must be supported by detailed information;
- deliberate false accusations must not be tolerated, and may result in disciplinary action;
- external assistance may be useful, notably from occupational health services.

Many are calling for the adoption of legislative rules governing such investigations, and their coordination with general whistleblower protection measures.

Finally, a company must take its own rules and regulations into account. Every company with at least 50 employees has the legal obligation to draw up internal rules and regulations, which notably set out the disciplinary sanctions applicable to employees, as well as a reminder of certain employees' rights.

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Thailand

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The Labour Protection Act B.E. 2541 (1998) (LPA) is the key legislation governing the relationship between

employer and employee in Thailand. The LPA set out a minimum standard for the protection of employees' rights, as well as a mechanism for suspension from work for an investigation.

The LPA requires any employer having ten or more employees to prepare work rules in the Thai language and the work rules require an employer to prescribe a procedure for the submission of grievances that would normally include the process for investigations in the workplace. Therefore, the work rules are the main guidance and policy that govern a workplace investigation. In some cases, an employer may have a whistleblowing policy allowing whistle-blowers to submit complaints of illegal or improper activities to the employer. The whistleblowing policy will also prescribe the procedures for investigating in workplace reflecting the complaints submitted by whistle-blowers.

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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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France

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When a report of wrongdoing is brought to the employer's attention, whether through a whistleblower or another channel, and an internal investigation is expected, it may be either mandatory or optional, depending on the facts of the alleged wrongdoing.

The investigation will be mandatory when the alleged wrongdoing relates to an ethical issue according to anti-corruption regulations, the employer's duty of due diligence regarding, for example, human rights or environmental matters, or where the works council has issued an alert relating to a "serious and imminent danger" (or to "fundamental human rights"), but also whenever it relates to the employer's obligation to ensure employee safety (eg, moral or sexual harassment).

If the investigation is not mandatory, it is up to the employer to decide whether or not to carry out the investigation. Several key questions can help the employer determine whether or not it is appropriate to carry out an investigation, such as:

- What are the benefits of doing nothing? The company will have to draw up a list of the pros and cons of an investigation, bearing in mind that in some cases a poorly conducted investigation could make the situation worse;
- What is the priority (eg, obtaining or securing evidence, or correcting the irregularity)?
- What rules or codes of ethics must the company comply with?
- Should external legal counsel only advise the company or should they play a major role in the

investigation process by becoming an investigator?

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Usually, a complainant submitting a grievance to the company would be a trigger for proceeding with a workplace investigation. The LPA does not specify when a workplace investigation should commence but it is subject to the employer's work rules and regulations, including the whistleblowing policy, as the investigation usually commences after an employee or a whistle-blower has filed a complaint to the employer. In some cases, there might be a whistleblower and the start of the workplace investigation would be subject to the whistleblowing policy and the employer's discretion. Also, if a questionable transaction or activity is detected, fiscal audits may be the source that triggers a voluntary workplace investigation.

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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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An employee may be suspended or relocated during a workplace investigation by:

- suspending the employee as a precautionary measure (eg, pending a confirmation of dismissal);
- temporarily assigning the employee to another site; or
- exempting the employee from having to work while continuing to pay them their salary.

The employee can be suspended as a precautionary measure, pending confirmation of dismissal, but this implies that disciplinary proceedings have already begun and that the investigation is therefore at a relatively advanced stage and that there is sufficient evidence to suggest the need for disciplinary action. It should be made clear to the employee that the suspension is a provisional measure (in the absence of specifying this, the suspension could be interpreted as a disciplinary layoff constituting a sanction and, in some jurisdictions, as depriving the employer of the possibility of dismissing the employee for the same

facts).

Temporary reassignment can also be considered. However, this contractual change must not apply for long and the measure taken must be temporary. The employer must act promptly – the measure is only valid for as long as the investigation continues. Failing this, and because of the absence of concurrent disciplinary proceedings, there is considerable risk that the temporary reassignment may be reclassified by a judge as an illegal modification of the employment contract or as a disciplinary sanction preventing the employee from subsequently being dismissed.

Finally, paid exemption from work is also possible and consists of temporarily suspending, by mutual agreement, the obligation of the employer to provide work for the employee and the employee's obligation to work, without affecting their remuneration. Such a measure must generally be taken with the consent of the employee, because it implies a suspension (and therefore a modification) of the employment contract. This measure may be useful in temporarily removing an employee with whom the employer maintains a good relationship. This may be an employee who is or feels they are a victim of harassment, especially when the employee is not on sick leave.

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While an employee is being investigated by the employer, the LPA permits the employer to suspend that employee from work for the duration of the investigation, provided that the suspension can only be made when permitted by the work rules or an agreement related to the conditions of employment. Also, a suspension order must be made in writing and specify the offence and period of the suspension, which may not exceed seven days. Note that the employer must give a written suspension order in advance to the employee before the work suspension.

As aforementioned, the LPA only permits the employer to suspend the employee under investigation from work only for seven days. During the interim period of the suspension, the employer must pay the employee at the rate indicated in the work rules or the agreement reached between the employer and the employee, which must not be less than half of the employee's wages for a working day before his or her suspension. If the employer determines that the employee subject to investigation is not guilty following the outcome, the employer must compensate the employee for outstanding wages from the date of suspension with 15% interest per annum.

In some complicated cases, a workplace investigation does not conclude within seven days, and, in which case the employer should consult with a legal advisor.

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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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In determining who is to conduct a workplace investigation, the main objective is to ensure that the team is independent or at least that it is perceived as being independent. The key people in the investigation team can be identified in a pre-established procedure. It is good practice to give decision-makers the possibility to set up, on a case-by-case basis, the team most appropriate to the situation.

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The employer should conduct a workplace investigation on its own; however, an outside firm experienced in interviewing witnesses and assessing the credibility of evidence may also be appointed to assist with the workplace investigation.

There is no minimum qualification or criteria provided under Thai laws. It is worth noting that anyone who has been accused of misconduct or potentially has a conflict of interest should be excluded from any role in the investigation. This is to avoid a challenge from the subject employee that the investigation was not conducted fairly.

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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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An internal investigation is not a police enquiry or a judicial instruction; there is no legal provision enabling an employee to stop the investigation. At the same time, there is no legal provision enabling the employer to force an employee to be interviewed. Interviewing an employee within the context of an internal investigation is also not a disciplinary matter. Therefore, the employee has no right to be assisted by another employee or an employee representative. The employee could, however, lawfully request the presence of their lawyer, especially if the company's lawyer is part of the investigation team.

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There is no mechanism in place to take legal action to halt an investigation. The investigation is an internal process of the employer.

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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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Co-workers can spontaneously act as witnesses and provide statements to superiors before, during or after the interviews. Co-workers can also be interviewed as witnesses at the investigator's request, although they are not under any obligation to answer the questions and they cannot be compelled to do so. The

investigators have an absolute obligation of discretion during the investigation and cannot reveal any details of the information gathered.

Certain employees may benefit from whistleblower status, which implies that they may be exempt from potential criminal and civil liability relating to their report or testimony and they are protected from any retaliatory measures from the employer. “Facilitators” who helped the whistleblower and the individuals connected with the whistleblower and risk retaliatory measures by testifying as a witness may also benefit from this status, as of 1 September 2022.

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Normally, the work rules prescribe requirements for cooperation with investigations. An employer may instruct co-workers to give statements as witnesses as this would be a fair and legitimate order of the employer, because investigations are conducted to maintain a good working environment.

Witness protection measures in a workplace can vary as no minimum standard has been set and they are generally subject to work rules and regulations. However, some legislation, which may not relate to a workplace investigation conducted by an employer, also protects the witnesses who are helping authorities investigate violations under the relevant acts. For example, the Labor Relation Act B.E. 2518 (1975) prohibits an employer from terminating an employee or conducting any action that may result in the employee being unable to work because of filing a complaint or being a witness for the authorities, or providing information on issues related to labour protection laws to the authorities.

The employer may have a policy of non-retaliation for the protection of witnesses who have given statements and evidence for a workplace investigation.

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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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GDPR principles fully apply to data gathering, as well as case law protecting the right to respect one's private life and the secret of correspondence.

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The basic premise is that all evidence is admissible unless it violates the law of admissibility and production of evidence, which may vary depending on the jurisdiction. In a criminal court, for example, evidence gathered in violation of the fruit of the poisonous tree doctrine would be typically inadmissible, yet in a civil court, this doctrine would not be an exclusionary rule.

The Personal Data Protection Act, BE 2562 (2019) (PDPA), which is the main data protection law in Thailand, applies when collecting, using, and disclosing pieces of evidence containing the personal data of employees. If the investigation requires sensitive information of the employee under investigation, for example, race, ethnic origin, political opinion, religious or philosophical beliefs, sexual behavior, criminal records, health data, disability, genetic data and biometric data, consent from the employee should be obtained.

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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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In internal investigations, the fundamental rights and freedoms of employees are at stake, including the right to privacy, respect for the privacy of home life and correspondence, freedom of expression, and the obligation of loyalty in searching for evidence.

In principle, work emails and files can be reviewed, even without the employee's consent, prior knowledge or warning. This includes: work email accounts; files stored on a work computer or a USB key connected to a work computer; and SMS messages and files stored on a work mobile phone and documents stored in the workplace unless they are labelled as “personal”. On the other hand, it is not permissible for an employer (or an investigator) to review “personal” emails and files, such as documents or emails identified as “personal” by the employee, or personal email accounts (Gmail, Yahoo, etc), even if accessed from a work computer.

There are certain exceptions to the above principle. An employer is allowed to check “personal” emails or data in any of the following cases:

- if the employee is present during the review;
- if the employee is absent, but was duly notified and invited to be present;
- if there is a particularly serious “specific risk or event”;
- if the review is authorised by a judge (this means having to prove a legitimate reason justifying not informing the employee).

When documents or emails are not marked as “personal” but contain information of a personal nature, the employer may open and review the data but may not use such documents or emails to justify applying disciplinary measures to the employee or use such documents or emails as evidence in court if they indeed relate to the employee’s private life.

Special attention must be given to employee representatives who must be entirely free to carry out their duties.

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Electronic information created during employment would generally be owned by the employer and would be the employer’s assets. If an employee is given a computer or laptop to use for work, the employer has the right to log into that device and take any data that is stored therein, provided that the data does not contain sensitive information of that employee and PDPA requirements are met.

To avoid any potential issues regarding physical data such as documents on the employee’s desk, it is advisable to search those areas with the subject employee to show good faith. In practice, the employee normally agrees to search those areas with the employer, or allows the employer to search alone.

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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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Evidence obtained in the context of an investigation must specify who provided it and the date it was provided. No retaliatory measures may be taken against the whistleblower for the act of whistleblowing.

In certain cases, the whistleblower report must be forwarded to the judicial authorities (eg, when there is an obligation to assist persons in imminent danger, for serious offences or a disclosure that a vulnerable person is in danger (ie, minors under 15 or a person who is unable to protect themselves)).

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It is down to the employer's discretion and subject to the whistleblowing policy (if any) to commence the investigation resulting from a complaint from a whistleblower. Whistleblowers and those who cooperate with an investigation should be protected. Normally the employer would not try to identify the whistleblowers. Also, it is best not to reveal the identity of the witness or the source of information; otherwise, they may feel uncomfortable giving information or raising their concerns next time. Any allegations of retaliation that surface during the investigation should be treated as a new report of possible misconduct that could be subject to additional investigation.

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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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Interviewers, investigators, interviewees or any others involved in the investigation are often bound by a reinforced confidentiality obligation, particularly when the internal investigation is triggered by a whistleblower alert. In addition, every person that comes to know of the investigation, facts or people involved is bound by an obligation of discretion. Furthermore, investigators should specifically be trained for interviews and be reminded of their obligations relating to the investigation.

The investigators will need to determine the order of the tasks to be carried out in the investigation, as this will have a significant impact on confidentiality management. Should they start with the hearings or a review of documents? The answer may depend on the subject matter of the investigation. It is advisable to first review the documentation before organising interviews, particularly to avoid the destruction of certain documents by employees acting in bad faith or by those wishing to erase the traces of alleged wrongdoing. Sometimes, however, it is possible to start with the interviews, especially in the case of harassment, as there may be no documents to review. If the decision is taken to conduct the documentation review after the interviews, it could be useful to ask the employees involved to sign a document stating that they must preserve and retain documents, meaning that if they delete or destroy documents, they would be acting against the company and in breach of the law.

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Unless the investigation is handled by a qualified professional (eg, attorney or auditor) where certain privileges apply, confidentiality obligations are generally subject to the contractual arrangement between the parties involved in the investigation. The employers need to inform any persons, including the investigators, to respect confidentiality obligations because a leak of the information gathered from the investigations could cause damage to relevant parties.

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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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According to the French data protection authority, the employee under investigation must be informed of the name of the person in charge of the investigation, the alleged facts that have led to the whistleblowing alert and their rights to access and rectify data collected about them. This information must be given as soon as the data collection starts, before the interviews, as per GDPR principles.

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The subject employee(s) should be informed of the details of the allegations, such as the details of wrongdoing or violations, made against them. This creates a fair opportunity for them to clarify themselves and defend against such allegations properly. Also, if there is any evidence that needs clarification from the employee, it should be shown to the employee.

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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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The identity of the complainant must be kept confidential and cannot be disclosed. There are two exceptions: if the complainant consents to the disclosure; or if the employer is asked for this information by the judicial authorities.

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It is generally possible to keep the identity of the complainant, witnesses, or information sources confidential. There is no mandatory rule to disclose the identity of a complainant, witnesses, or sources of information. If the complainant, witnesses, or sources of information for the investigation know that their identities would not be disclosed, they will be more confident in cooperating with and supporting the investigations.

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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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Most of the time, the legal protection afforded by the legally prescribed confidentiality obligation that applies to whistleblowing is sufficient. This is all the more so given every person involved is bound by an obligation of discretion. However, there is no legal obstacle to the creation of an NDA between the employer and the people involved.

NDAs setting out a strict and reinforced obligation of confidentiality and discretion during the investigation should be signed by any external parties involved (eg, translation agency, IT expert) or when the internal investigation is outside the scope of whistleblowing regulations.

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Non-disclosure agreements can be made between an employer and employees who are involved in an investigation. This may include investigators and witnesses, apart from the employee under investigation. This minimises the risk of information being leaked, which can affect all parties related to the workplace investigation. However, an NDA is not absolute means to prevent the disclosure of confidential information, as the court has the authority to compel disclosure.

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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 does not generally apply to internal investigation materials as the investigation does not constitute a relationship between a lawyer and their client, and even less so a judicial investigation. However, if a lawyer is appointed as an investigator, privilege may apply to materials exchanged between the lawyer and that client.

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Client-attorney privilege between qualified attorneys and the client (ie, an employer) begins once information is made available to the attorney, regardless of the form it takes.

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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 employee under investigation has the right to be assisted by a lawyer during the interviews and, if the employee chooses to be so, the lawyer must also always be present. The employee may not, however, be accompanied by anyone other than a legal representative (ie, another employee cannot attend the interview).

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Unless the work regulations provide otherwise, an employee has the right to request legal representation during an investigation. If legal representation is requested, it is an opportunity for the employer to confirm and verify that an investigation is being conducted fairly, as the employee under investigation can bring his or her lawyer to attend the investigation.

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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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Neither the works council nor the trade unions have any right to be informed or involved in the investigation. It is the employer who is responsible for carrying out the investigation. However, when the investigation is triggered due to a works council issuing an alert relating in particular to a “serious and imminent danger”, one member of the works council must be involved in the investigation process.

Last updated on 15/09/2022



Thailand

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Thai labor laws do not require a workplace investigation to involve participation from trade unions or labour unions. However, it is possible for labour unions established under the Labor Relation Act BE. 2518 (1975) to submit a demand for a collective bargaining agreement (CBA) with employers to get a seat at the table. There was a case where a management union made a CBA with the employer wherein the president of the management union would be involved in any investigation of any manager, who is a union member, under investigation. In that case, the employer must comply with the CBA by informing the president and allowing the president to participate in the investigations.

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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.

Last updated on 15/09/2022



France

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Apart from being informed of any facts and data concerning them being collected during the investigation, employees involved in the investigation do not have any specific rights. Some companies choose to use external firms specializing in psychosocial risk management, not only to conduct internal investigations, but also to provide additional psychological support for their employees, as part of the employer's safety obligation.

Last updated on 27/11/2023



Thailand

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The employees may then file a complaint with the labour inspection officer of the Labour Protection and Welfare Department to investigate the situation if they view that the conduct of the employer in the investigation violates the LPA. For example, if the employer issues a written order for suspending an employee for more than seven days. The labour inspection officer may issue an order requesting compliance, where failure to comply with such an order would result in a criminal penalty.

Last updated on 15/09/2022

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



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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



France

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Unrelated matters revealed during the investigation do not necessarily mean that another investigation will be opened. Nevertheless, if reprehensible acts unrelated to the current investigation are revealed, the employer will need to take action and sanction the perpetrator (after checking the facts). Sometimes the only way to check the facts is to carry out another investigation on a separate matter. However, the investigation team may also consider if there is enough connection between the matters to widen the scope of the current internal investigation.

Last updated on 15/09/2022

Thailand

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Subject to the grievance protocol in place, any matter that emerges during the investigation should be handled separately as a fresh report of potential misconduct that needs further investigation.

Last updated on 15/09/2022

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

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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

France

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The grievance may also have to be investigated (eg, moral/sexual harassment reported by an employee under investigation).

Last updated on 15/09/2022

Thailand

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The investigator should guide the employee who has raised the grievance to properly raise their concerns through the grievance protocols or whistleblowing policy (if any). It is acceptable to preliminarily hear their concerns, but the investigation should be initiated separately and subject to the employer's discretion.

Last updated on 15/09/2022

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

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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

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The investigation will likely be able to continue with the other employees and, as soon as the employee under investigation returns from sick leave, they will be able to be interviewed.

However, as disciplinary sanctions are time-barred after two months from the moment the misconduct was committed or from when the employer becomes aware of it, if the sick leave lasts for the whole of that period, the investigation must be conducted anyway. In this instance, the investigator can ask the employee to attend the interview despite being on sick leave or arrange for the interview to take place using other means (eg, conference call). As a last resort, a questionnaire can be sent to the employee, but the pros and cons must be assessed as this is a way of information gathering that carries a certain amount of risk, could be less reliable and is of less probative value.

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If the absence is anticipated to be brief, the employer may wait until the employee's return before concluding the investigation. If the employee's absence is expected to be prolonged, the investigator may alter the time of meetings or request that the employee submits a witness statement. The key point would be that all necessary measures should be taken to give the employee a chance to participate.

Last updated on 15/09/2022

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

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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

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A criminal investigation always takes precedence over other investigations. However, this does not mean that the internal investigation has to stop. It can and should continue, and the report drawn up upon completion of the investigation could be used by the authorities in the criminal investigation. In some cases, especially when privilege does not apply, police or regulatory authorities may request that the employer share such evidence. However, even when privilege does apply, there is no certainty that the evidence would not have to be communicated to certain authorities.

Some administrative authorities often challenge the application of legal privilege or try to reduce its scope. For example, the French financial markets authority (AMF) regularly puts forward its view of legal privilege, according to which an email where a lawyer is only copied (and is not one of the main recipients) in from one of their clients is not confidential and can therefore be disclosed in proceedings. However, if the AMF investigators impose disclosure of privileged documents, this should result in the annulment of the investigation procedure. By way of exception, legal privilege cannot be invoked against certain other authorities, such as the URSSAF (authority in charge of collecting social security contributions) or the DGCCRF (directorate-general for competition, consumer protection and anti-fraud investigations). Where legal privilege is enforceable, the judge must first determine whether the documents constitute correspondence relating to defence rights and, second, must cancel the seizure of documents that they find to be covered by legal privilege due to the principle of professional secrecy of relations between a lawyer and their client and the rights of defence.

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Employers are not required to wait until the police or regulatory investigations are finished before conducting their disciplinary investigations, but it is necessary to ensure that such internal proceedings do not compromise the integrity of an investigation or result in misrepresentation or a miscarriage of justice. The level of proof for internal disciplinary action is less than the level of proof for criminal proceedings.

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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.

Last updated on 15/09/2022

France

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The employee under investigation, like the other employees interviewed and the whistleblower, must be informed that the investigation has been completed. However, there is no obligation to provide them with the report and, for reasons of confidentiality, it is very often best not to do so.

Last updated on 15/09/2022

Thailand

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There is no mandatory information on the outcome of an investigation that must be disclosed to an employee. However, disclosure of the outcome should, at a minimum, include whether an employee did or did not commit a violation. In addition, an employee who has committed a violation should be informed of any disciplinary action, and the grounds for such a decision (such as a violation of the company's work rules). This enables the employee under investigation to appeal the outcome if it is applicable under the work rules or whistleblowing policy.

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

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

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France

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There is no obligation to share the investigation report. The findings, or a summary of them without revealing any confidential information, may be disclosed, but it is the employer's responsibility to keep the identity of every person interviewed confidential.

Last updated on 15/09/2022

Thailand

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It depends on with whom the investigation report should be shared. If there is a court case or criminal case to be further investigated by police, the investigation report should be shared in full as this would be used as documentary evidence to make a case stronger. On the contrary, if the investigation report is requested by the employee under investigation, employers are entitled to use their discretion as to what information to share.

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24. What next steps are available to the employer?

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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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The employer can decide to sanction the person who was under investigation or to close the case. The employer may also need to protect any victims, witnesses and whistleblowers. If, during the investigation, it is discovered that a supplier or other commercial partner is implicated, the relevant contract may be terminated. The employer can take legal action, file a complaint (if the company is a direct victim of a criminal offence) or report the offence to the public prosecutor's office. The employer must archive the file or ensure its lawful preservation after a certain period.

Last updated on 15/09/2022

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Upon completion of the investigation, the employer can decide to take proper disciplinary action against the employee if it is found that the employee committed an offence or violated the work rules. An employer may also file a report with the police if the findings of the investigation amount to a criminal offence.

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

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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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The findings must be submitted to the employer or management, but there is no obligation to disclose them to anybody else. The only exception is if a judicial investigation has been opened. In this case, the entire report must be provided to the authorities if the judge requests this. Normally the investigators only take written notes and there is no audio or video recording, unless the employee consents. Whether or not to make a voluntary disclosure of wrongdoing is a tactical decision for companies. Disclosure may mitigate fines and penalties or even help the employer avoid liability entirely. However, the downsides of disclosure include increased costs, the possibility of a follow-on government investigation and exposure to penalties. Thus, most companies assess their options on a case-by-case basis to determine what steps would be in the best interests of the company.

Last updated on 15/09/2022

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The investigation findings should be disclosed to a limited group of persons who are involved in the investigation, and for which the findings are useful. For example, an HR manager who needs to record the findings in the employee's record, the police if the employer decides to proceed further with a criminal claim, the court if requested by that court, or if there is a court case related to the violations of the employee.

Interview records should be kept confidential and private. There is a risk of disclosure because the information in the records may be beneficial to one but damaging to others. If the interview records are leaked to others who are not involved in the investigation, it may affect the work environment in the workplace and the protection of witnesses.

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

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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.

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If the outcome of the internal investigation has led to the sanctioning of an employee, this sanction may no longer be invoked to support a new sanction after three years. Moreover, under the GDPR principles, the duration of retention must be proportional to the use of the data. Therefore, the data must be retained only for a period that is "strictly necessary and proportionate". If the employer wants to keep information about the investigation in the longer term, it is possible to archive the employee's record even though the employer will no longer be able to use it against the employee after three years.

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There is no period required by law for keeping the outcome of the investigation on the employee's record.

However, if termination of employment is the outcome of the investigation, an employer should keep details of the investigation for at least 10 years, in line with the prescribed period for an employee to file an unfair dismissal claim against an employer. An employer may use the details of an investigation to defend such a claim. For other disciplinary action, the retention of investigation details on the employee's record is at the employer's discretion.

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

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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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Within the context of an investigation following a whistleblower alert, any violation of the confidentiality obligation is punishable by two years' imprisonment and a €30,000 fine.

If the employer fails to comply with its obligation to protect its employees' safety, the employer will be liable for damages resulting from any failings during the investigation (eg, if sexual harassment is reported and no action is taken by the employer)

Last updated on 15/09/2022

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The Thai Supreme Court has ruled that the termination of an employee was unfair due to an investigation being conducted contrary to requirements in the company's work rules. As such, employers may be liable for damages to employees if there are errors made during investigations, or where investigations are not conducted properly.

The Supreme Court has also ruled that in cases of unfair termination, the underlying cause of the termination should be the determining factor, rather than other issues, including investigative procedures.

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