

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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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?

Finland

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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.

Last updated on 15/09/2022

Switzerland

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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.^[1] However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal

investigation).[2]

[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on hrtoday.ch, last visited on 17 June 2022.

[2] Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on hrtoday.ch, last visited on 17 June 2022.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

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The Swiss Federal Act on Data Protection applies to the gathering of evidence, in particular such collection must be lawful, transparent, reasonable and in good faith, and data security must be preserved.[1]

It can be derived from the duty to [disclose and hand over benefits received and work produced](#) (article

321b, Swiss Code of Obligations) as they belong to the employer.^[2] The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

It is advisable to state in internal regulations that the workplace might be searched as part of an internal investigation and in compliance with all applicable data protection rules if this is necessary as part of the investigation.

^[1] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 52.

^[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 148.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

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From an employment law point of view, there is no statute of limitations on the employee's violations. Based on the specific circumstances (eg, damage incurred, type of violation, basis of trust or the position of the employee), a decision must be made as to the extent to which the outcome should remain on the record.

From a data protection point of view, only data that is in the interest of the employee (eg, to issue a reference letter) may be retained during the employment relationship. In principle, stored data must be deleted after the termination of the employment relationship. Longer retention may be justified if rights are

still to be safeguarded or obligations are to be fulfilled in the future (eg, data needed regarding foreseeable legal proceedings, data required to issue a reference letter or data in relation to a non-competition clause).^[1]

[1] Wolfgang Portmann/Isabelle Wildhaber, Schweizerisches Arbeitsrecht, 4. Edition, Zurich/St. Gallen 2020, N 473.

Last updated on 15/09/2022

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