# Workplace Investigations

## Contributing Editors

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

### Singapore

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A workplace investigation is usually governed by the employer's internal grievance policy or contractual guidelines found in the employment contract or employee handbook. In the absence of the same, the default governing regime is as set out by the Ministry of Manpower (MOM) and the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP) in its guidelines and advisories, which include:

- the Tripartite Advisory on Managing Workplace Harassment;
- the TAFEP Grievance Handling Handbook; and
- the Tripartite Guidelines on Fair Employment Practices.

In addition, section 14(1) of the Employment Act 1968 provides that an employer is required to conduct "due inquiry" before dismissing an employee covered under the Employment Act 1968 without notice for misconduct. The Singapore Courts take the view that "due inquiry" suggests some sort of process in which the employee concerned is informed about the allegations and the evidence against him or her so that he or she has an opportunity to defend him or herself with or without evidence during the investigation process.

Further, there are numerous cases where the Singapore High Court has alluded to or implicitly accepted the application of the implied term of mutual trust and confidence in employment contracts that would oblige the employer to act reasonably and fairly during the investigation, even though it is worth noting that the Singapore Court of Appeal has stated that the status of the implied term of mutual trust and confidence has not been settled in Singapore and that the Appellate Division of the Singapore High Court has stated that "[i]t remains an open question for the Court of Appeal to resolve in a more appropriate case, ideally with facts capable of bearing out a claim based directly on the existence of the implied term" (see [81]-[82] of Dong Wei v Shell Eastern Trading (Pte) Ltd and another [2022] SGHC(A) 8).

Hence, any references to the application of the implied term of mutual trust and confidence in Singapore in this article must be read in light of the above.

The current position is expected to change in the second half of 2024, with the passing of Singapore's first workplace fairness law, the Workplace Fairness Legislation. On 4 August 2023, the Singapore government announced that it has accepted the final set of recommendations by the Tripartite Committee on Workplace Fairness in respect of the upcoming Workplace Fairness Legislation. The Tripartite Committee on

Workplace Fairness recommended, among other things, that employers are required to put grievance-handling processes in place. It is therefore expected that the Workplace Fairness Legislation may contain requirements on how and when a workplace investigation should be conducted.

This article sets out the current position, before the Workplace Fairness Legislation was enacted, and will be updated when appropriate.

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## Sweden

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Workplace investigations in Sweden are governed by several rules and regulations. Listed below are the central legislation and regulations that govern a workplace investigation related to alleged employee misconduct.

- The Swedish Discrimination Act (2008:567).
- The Swedish Work Environment Act (1977:1160), which is complemented by the Swedish Work Environment Authority's other statutes.[1]
- The Swedish Whistleblowing Act (2021:890).

If a workplace investigation has been initiated after the receipt of a report filed through a reporting channel established under the Swedish Whistleblowing Act, that law applies provided that the report has been filed by a person who may report under the Act and provided that the subject of the report falls under the material scope of the Act. The Swedish Whistleblowing Act implements Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law and has been given a wide material scope in Sweden. The Swedish Whistleblowing Act may apply if the reported irregularity concerns breaches of certain EU laws or if the reported irregularity is of public interest.

In addition to the regulations mentioned above, certain data protection legislation may affect workplace investigations by restricting what personal data may be processed. Such data protection legislation includes the following:

- Regulation (EU) 2016/679 on the protection of natural persons concerning the processing of personal data and the free movement of such data (the GDPR);
- the Swedish Supplementary Data Protection Act (2018:218);
- the Swedish Supplementary Data Protection Regulation (2018:219);

- Regulation DIFS:2018:2 on the processing of personal data relating to criminal convictions or offences. This regulation governs the processing of personal data relating to criminal convictions or suspected criminal offences in internal workplace investigations that are not governed by the Swedish Whistleblowing Act.[2]

The above-mentioned legislation and regulations may overlap in many aspects and it is therefore important before starting an investigation, as well as during an investigation, to assess which rules and regulations apply to the situation at hand. Another aspect of this is that many issues that can arise during an investigation are not regulated by law or other legislation. If the investigation is a non-whistleblowing investigation there are limited rules on exactly how and by whom the investigation should be carried out.

A Swedish law firm that undertakes a workplace investigation also has to adhere to the Swedish Bar Association's Code of Conduct. The Code of Conduct includes additional considerations, mainly ethical, which will not be addressed in this submission. Furthermore, this submission will not focus on investigations following an employee's possible misappropriation of proprietary information or breach of the Swedish Trade Secrets Act (2018:558). Investigations into such irregularities are often conducted to gather evidence and these investigations include the same or similar investigative measures used in other investigations, such as interviews with employees and IT-forensic searches, but also infringement investigations carried

out by the authorities or other measures by the police.

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[1] Mainly Systematic Work Environment Management (AFS 2001:1), Organisational and Social Work Environment (AFS 2015:4) and Violence and Menaces in the Working Environment (AFS 1993:2)

[2] Under Section 2 item 4 of DIFS 2018:2, personal data relating to criminal convictions or suspected criminal offences may only be processed if the personal data concerns serious misconduct, such as bribery, corruption, financial fraud or serious threats to the environment, health and safety, by an individual who is in a leading position or who is considered key personnel within the company. The processing of personal data received in a report or collected during an investigation governed by the Swedish Whistleblowing Act is instead governed by the Swedish Whistleblowing Act, which complements the GDPR and the supplementing Swedish act and regulation stated in item (ii) and (iii) above.

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### Switzerland

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There is no specific legal regulation for internal investigations in Switzerland. The legal framework is derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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

### Singapore

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A workplace investigation usually commences with the receipt of feedback, a complaint or a grievance, by named or anonymous persons, in respect of a work-related matter or event, or the conduct of an employee.

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### Sweden

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An investigation can be initiated in several ways. It is usually as a result of whistleblowing or a report on work environment deficiencies, or through other channels (eg, HR, the police, media coverage).

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## Switzerland

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Internal investigations are usually initiated after reports about possible violations of the employer's code of conduct, applicable laws or regulations have been submitted by employees to their superiors, the human resources department or designated internal reporting systems such as hotlines (including whistleblowing hotlines).

For an internal investigation to be initiated, there must be a reasonable suspicion (grounds).[1] If no such grounds exist, the employer must ask the informant for further or more specific information. If no grounds for reasonable suspicion exists, the case must be closed. If grounds for reasonable suspicion exist, the appropriate investigative steps can be initiated by a formal investigation request from the company management.[2]

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[1] Claudia Fritsche, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, p. 21.

[2] Klaus Moosmayer, Compliance, Praxisleitfaden für Unternehmen, 2. A. München 2015, N 314.

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

## Singapore

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Yes. Section 14(1) read with 14(8) of the Employment Act 1968 provides that an employee can be suspended during a workplace investigation

However, pursuant to section 14(8) of the Employment Act 1968, the employer:

- may suspend the employee from work for:
  - a period not exceeding one week; or
  - such longer period as the Commissioner for Labour may determine on an application by the employer; but
- must pay the employee at least half the employee’s salary during the period the employee is suspended from work.

Section 14(9) of the Employment Act 1968 further states that if the inquiry does not disclose any misconduct on the employee’s part, the employer must immediately restore to the employee the full amount of the withheld salary.

In addition to the above legislative requirements, the company is required to also comply with its policies

relating to such suspensions.

In terms of the threshold to be crossed before a suspension can take place, the Singapore Courts have highlighted that suspending an employee quickly as part of a “knee-jerk” reaction to an unclear or unspecific allegation with dubious credibility is arguably a breach of the implied term of mutual trust and confidence that exists in all employment relationships ([56] of *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2021] SGHC 123). The employer would need to have proper and reasonable cause to suspend an employee for disciplinary purposes ([56(d)] of *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577; [2013] SGHC 32), for example, where multiple credible sources claimed that they had been sexually harassed by an employee, and the employer had strong grounds to believe that if the employee was not suspended, the safety and wellbeing of the other employees in the organisation would be threatened.

In contrast, an employer is not entitled to suspend an employee during a workplace investigation where the employer has only received one complaint that has not been properly described or substantiated with sufficient details from an unverified or unreliable source against an employee who has a good track record with the organisation. This is especially so if the complaint is so unclear that further inquiries should be made before the allegation can be properly ascertained and characterised (see also [51] of *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2021] SGHC 123).

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## Sweden

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In general, an employee in the private sector may be temporarily suspended for a short period with pay and other benefits during a workplace investigation. The room for suspension without pay is, by contrast, very limited. An applicable collective bargaining agreement may impose additional restrictions on the right to temporary suspend an employee. The suspension should be limited in time and only be in force during the investigation, but can be repeated for (multiple) additional short periods if necessary to conclude the investigation. An assessment needs to be made on a case-by-case basis as suspension in some cases may be considered unlawful. If not executed with sufficient consideration of the employee’s interests, it may be considered a constructive dismissal or a breach of the employer’s work environment obligations. If the employee is unionised, trade unions sometimes request that the employer initiates consultations as part of a decision to suspend an employee.

In the public sector, the right to suspension is limited. There are also special regulations regarding the suspension of certain employees, for example, employees who are employed as permanent judges.

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## Switzerland

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It is possible to suspend an employee during a workplace investigation.[1] While there are no limits on duration, the employee will remain entitled to full pay during this time.

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[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 181.

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

## Singapore

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While there are no prescribed minimum qualifications or criteria that need to be met for any person conducting a workplace investigation, the person handling employee grievances should be someone who:

- has been authorised and empowered to do so by the employer;
- is not in a position of actual or potential conflict; and
- is independent and impartial.

The grievance handler should be familiar with the organisation's investigative procedure, have attended the relevant training to ensure full compliance with the same; and have a good understanding of the expectations and norms set out by the Tripartite Guidelines on Fair Employment Practices.

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## Sweden

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If the workplace investigation falls under the Swedish Whistleblowing Act, the investigation has to be conducted by independent and autonomous persons or entities designated under the Swedish Whistleblowing Act as competent to investigate reports.

If the workplace investigation is not governed by the Swedish Whistleblowing Act, there are no minimum qualification requirements. When appointing an investigator, one should consider who would be most suitable in the given situation. For example, it may in some situations be more suitable to have an external investigator to ensure impartiality.

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## Switzerland

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The examinations can be carried out internally by designated internal employees, by external specialists, or by a combination thereof. The addition of external advisors is particularly recommended if the allegations are against an employee of a high hierarchical level[1], if the allegations concerned are quite substantive and, in any case, where an increased degree of independence is sought.

[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 18.

Last updated on 15/09/2022

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

### Singapore

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The employee under investigation is entitled to apply to the Court to stop the investigation. However, the employee bears the legal burden of showing that the employer has, for instance:

1. failed to comply with the organisation's grievance policy;
2. committed a serious breach of natural justice; and/or
3. breached the implied term of mutual trust and confidence when investigating the matter, and that such a breach will, unless remedied, cause such prejudice to the employee that it would be more just for the investigation to be stopped than to be allowed to continue.

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### Sweden

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No. It should, however, be noted that the employee under investigation may claim a right to rectification under article 16 of the GDPR and its right to object to processing under article 21 of the GDPR. This may give the employee under investigation an undesirable opportunity to withhold evidence and obstruct or impede the investigation. The risk of these rights being exercised is, however, considered to be low.

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### Switzerland

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The accused could theoretically request a court to stop the investigation, for instance, by arguing that there is no reason for the investigation and that the investigation infringes the employee's personality rights. However, if the employer can prove that there were grounds for reasonable suspicion and is conducting the investigation properly, it is unlikely that such a request would be successful.

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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?

## Singapore

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Singapore law does not impose any statutory or legal obligation on an employee to act as a witness in the investigation. Accordingly, an employer does not have the power to compel its employees to act as witnesses in an investigation.

Notwithstanding this, an employer may require an employee to assist in investigations pursuant to specific contractual obligations in the employee's terms of employment (as may be contained in the employment contract, employee handbook or the employer's internal policies and procedures in dealing with the investigations, etc). Further, a request for an employee to provide evidence of an event that he or she knows of may reasonably be deemed to be a lawful and reasonable directive from an employer.

Consequently, an employee's refusal to act as a witness may amount to an act of insubordination that may attract disciplinary action by the employer.

Employers requiring employees to act as witnesses in an investigation must ensure that they comply with the expectations and norms set out by the Tripartite Guidelines on Fair Employment Practices and the TAFEP Grievance Handling Handbook.

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## Sweden

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In general, yes, employees in Sweden have a far-reaching duty of loyalty toward their employers. This includes, among other things, a duty to truthfully answer an employer's questions and to inform the employer of events that may be of interest to the employer. An employee's obligation to assist is, however, more limited when assistance would entail self-incrimination.

A person acting as a witness under an investigation governed by the Swedish Whistleblowing Act will be protected by confidentiality. Personal data and details that could reveal the identity of a witness may not be disclosed without authorisation.

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## 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]

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[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.

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

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The employer may collect the personal data of an individual without the individual's consent or from a source other than the individual, where it is necessary for any investigation according to section 17(1) read with paragraph 4 of Part 3 of the Third Schedule of the Personal Data Protection Act 2012 (PDPA). Under section 2(1) of the PDPA, "investigation" means an investigation relating to:

- a breach of an agreement;
- a contravention of any written law, or any rule of professional conduct or other requirement imposed by any regulatory authority in the exercise of its powers under any written law; or
- a circumstance or conduct that may result in a remedy or relief being available under any law.

Under the Banking Act 1970, a bank and its officers cannot disclose customer information to third parties, subject to certain exceptions. An employer carrying out a workplace investigation does not fall within any of the exceptions.

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### Sweden

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To the extent the gathering of physical evidence includes the processing of personal data, please see question 1.

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## Switzerland

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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.

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[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.

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

## Singapore

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The employer is not allowed to search employees' personal possessions or files as part of an investigation without the employee's consent. However, such consent may be explicitly provided for in the terms of employment (as may be contained in the employment contract, employee handbook or the employer's internal policies and procedures in dealing with the investigations, etc). The employer may, however, search the employees' company email accounts and files if these are stored on the company's internal systems or devices.

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## Sweden

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An employer can search an employee’s personal possessions (eg, handbag, pockets and locker) if the employer has a legitimate interest in a search. This could, for example, include a reasonable suspicion of theft of employer property. Furthermore, an employer may search, but not continually monitor, an employee’s computer and email provided that it is in accordance with GDPR requirements. For the processing to be lawful under the GDPR, the employer has to establish a purpose and a legal basis for the processing of personal data. Furthermore, data subjects must have received information on the legal basis for and purpose of the processing of personal data beforehand. If the data subjects have not received such information, the employer’s right to process their data is limited. However, if the employer has reasonable grounds to believe that trade secrets or similar has been copied and stolen, no such requirements would typically apply.

Investigations into an employee's possessions may, under certain circumstances, also be carried out by the Swedish authorities.

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### Switzerland

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The basic rule is that the employer may not search private data during internal investigations.

If there is a strong suspicion of criminal conduct on the part of the employee and a sufficiently strong justification exists, a search of private data may be justified.[1] The factual connection with the employment relationship is given, for example, in the case of a criminal act committed during working hours or using workplace infrastructure.[2]

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[1] Claudia Fritsche, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, p. 168.

[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, p. 168 et seq.

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

### Singapore

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Under the Prevention of Corruption Act 1960 and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992 (CDSCA), in any civil or criminal proceeding, no witness is obliged to disclose the name or address of any informer, or disclose any information that might lead to his or her discovery concerning offences such as corruption, drug trafficking, and money laundering, save where:

- in any proceeding for the offence, the Court, after a full inquiry into the case, is of the opinion that the informer wilfully made, in his complaint, a material statement that he knew or believed to be false or

did not believe to be true; or
- in any other proceeding, the court is of the opinion that justice cannot be fully done between the parties without the discovery of the informer.

In line with the above, employers should therefore keep the informer's identity confidential upon receiving a complaint relating to corruption, drug trafficking, money laundering, and other serious offences prescribed in the second schedule of the CDSCA.

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### Sweden

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If the Swedish Whistleblowing Act governs the investigation, additional considerations apply relating to who may investigate a reported irregularity (see question 4) and the duty of confidentiality and restrictions on access to and disclosure of personal data in investigations (see questions 6, 10 and 11), as well as the rights and protections of whistleblowers.

As regards the rights and protections of whistleblowers, the following can be noted. A person reporting in a reporting channel governed by the Swedish Whistleblowing Act is protected against retaliation and restrictive measures. Thus, companies are prohibited from preventing or trying to prevent a person from reporting, and retaliating against a person who reports. Furthermore, a reporting person will not be held liable for breach of confidentiality for collecting the reported information if the person had reasonable grounds to believe that it was necessary to submit the report to expose irregularities. Under the Swedish Whistleblowing Act, any person reporting irregularities in a reporting channel established under the Swedish Whistleblowing Act may also report irregularities to designated Swedish authorities.

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### Switzerland

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If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

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

### Singapore

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The existence and scope of any confidentiality obligations would generally depend on the specific terms of the employment contract, employee handbook or the employer's internal policies and procedures in dealing with the investigations.

In the context of investigations into workplace harassment issues, the Tripartite Advisory on Managing Workplace Harassment issued by the MOM provides that the identities of the alleged harasser, affected persons and the informant should be protected unless the employer assesses that disclosure is necessary for safety reasons.

This may change with the enactment of the Workplace Fairness Legislation referred to in question 1. The Tripartite Committee on Workplace Fairness recommended, among other things, that employers should protect the confidentiality of the identity of persons who report workplace discrimination and harassment, where possible. As such, it is expected that the upcoming Workplace Fairness Legislation may impose certain confidentiality obligations on an employer during an investigation.

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## Sweden

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If the Swedish Whistleblowing Act applies, the persons or entities handling the investigation have a duty of confidentiality and may not, without permission, disclose any information that could reveal the identity of the reporting person, any person subject to the report or any other person mentioned in the report or during the investigation of the report. Access to personal data is limited to designated competent entities or persons. Investigative material including personal data may not be shared with other persons or entities during the investigation. Once the investigation has reached actionable conclusions, investigative material may be shared with other persons or entities, such as HR or the police, provided that such sharing is necessary to take action on the outcome of the investigation. Investigative material may also be shared if it is necessary for the use of reports as evidence in legal proceedings or under the law or other regulations.

If the Swedish Whistleblowing Act does not apply, there are no particular confidentiality obligations for employers. Yet, an employer needs to consider what information is suitable to share during an investigation, how this is done and to whom it is shared. An employer must also respect employees' privacy in line with what is generally considered good practice in the labour market. This means that an employer should be careful as to what sensitive and personal information is shared during an investigation. Furthermore, the spreading of damaging information (even if true) about an employee to a wider group may be a criminal offence under the Swedish Criminal Code.

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## Switzerland

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Besides the employee's duty of performance (article 319, Swiss Code of Obligations), the employment relationship is defined by the employer's duty of care (article 328, Swiss Code of Obligations) and the employee's duty of loyalty (article 321a, Swiss Code of Obligations). Ancillary duties can be derived from the two duties, which are of importance for the confidentiality of an internal investigation.[1]

In principle, the employer must respect and protect the personality (including confidentiality and privacy) and integrity of the employee (article 328 paragraph 1, Swiss Code of Obligations) and take appropriate measures to protect the employee. Because of the danger of pre-judgment or damage to reputation as well

as other adverse consequences, the employer must conduct an internal investigation discreetly and objectively. The limits of the duty of care are found in the legitimate self-interest of the employer.[2]

In return for the employer's duty of care, employees must comply with their duty of loyalty and safeguard the employer's legitimate interests. In connection with an internal investigation, employees must therefore keep the conduct of an investigation confidential. Additionally, employees must keep confidential and not disclose to any third party any facts that they have acquired in the course of the employment relationship, and which are neither obvious nor publicly accessible.[3]

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[1] Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

[2]Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 202.

[3] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 133.

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

## Singapore

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There is no specific list of information about the allegations against the employee under investigation that must be provided to the employee under investigation. However, the information provided to the employee must be sufficiently clear and specific so that the employee understands the case being made against him or her and can respond to it. The employee should also be made aware of the evidence against him or her and be given a reasonable opportunity to respond.

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According to article 14 of the GDPR, no information must be provided. The exemption in article 14.5(b) applies to the extent the obligation to provide such information is likely to render impossible or seriously impair the objectives of the processing of the personal data of the employee under investigation (ie, to diligently investigate the suspected irregularity).

If the Swedish Whistleblowing Act applies, information about where the personal data processed originates from may not be provided under article 14 of the GDPR, as the personal data must remain confidential subject to obligations under the Swedish Whistleblowing Act.

In addition to the above, an investigation should, to the extent possible and suitable, be characterised by

the principles in ECHR (particularly articles 6 and 8). The employee under investigation should, among other things, be presented with sufficient information to safeguard his or her interests and be allowed to respond to the allegations. The investigation must also be compliant with the work environment responsibilities that the employer has concerning the involved parties (see questions 17 and 20).

Last updated on 15/09/2022

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

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

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

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

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

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

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

Last updated on 15/09/2022

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

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

Such information can be kept confidential, subject to questions 10 and 11. However, disclosure may nevertheless be compelled in court or arbitration proceedings as well as by disclosure requests or directions by the police or statutory authorities, including the MOM.

Last updated on 15/09/2022

## Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

If the Swedish Whistleblowing Act applies, their identity must be kept confidential under the duty of confidentiality. If the Swedish Whistleblowing Act does not apply, their identity can to a large extent be kept confidential.

It can also be noted that a workplace investigation carried out in the public sector will often (eventually) become an official document, which means that the document can be requested by the public. There are, however, provisions on secrecy that may restrict the right to gain access to official documents. These provisions are found in the Public Access to Information and Secrecy Act (2009:400).

Last updated on 15/09/2022

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused' interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person

implicated by the information provided.[1]

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

Last updated on 15/09/2022

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

### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

Yes, NDAs can be used to keep the fact and substance of an investigation confidential. There are no express prohibitions against such NDAs under Singapore law. However, information or evidence covered by the NDA may still be discoverable in court or arbitration proceedings; and may also be subject to disclosure requests or directions by the police or statutory authorities, including the MOM.

Last updated on 15/09/2022

### Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

NDAs can be used for some investigations carried out in the private sector. However, under the Swedish Whistleblowing Act, a contract is void to the extent it retracts or restricts a person's rights under the Swedish Whistleblowing Act. An NDA that restricts the right to report irregularities to authorities or the media would, therefore, typically be void.

Last updated on 15/09/2022

### Switzerland

Author: *Laura Widmer, Sandra Schaffner*
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In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

Last updated on 15/09/2022

## 14. When does privilege attach to investigation

# 14. When does privilege attach to investigation materials?

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
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Litigation privilege may attach to investigation materials if there was a reasonable prospect of litigation at the time of the creation of the materials, and the materials were created for the dominant purpose of a pending or contemplated litigation.

Legal advice privilege may attach to investigation materials if the materials were created to seek or obtain legal advice; or if the materials contain legal advice that is so embedded or has become such an integral part of the materials that the legal advice cannot be redacted from them. If the legal advice is separable from the materials, then only the parts of the materials containing legal advice will be protected by privilege.

Last updated on 15/09/2022

## Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

Attorney-client privilege will apply to all communication and investigative material between a client and its law firm. Attorney-client privilege is, however, not without limitations. Regarding investigations into alleged employee misconduct, a law firm may have to report suspected money laundering to the authorities and under certain circumstances disclose information to the financial police.

Written material covered by attorney-client privilege generally may not be seized.

Last updated on 15/09/2022

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

As outlined above, all employees generally have the right to know whether and what personal data is being or has been processed about them (article 8 paragraph 1, Swiss Federal Act on Data Protection; article 328b, Swiss Code of Obligations).

The employer may refuse, restrict or postpone the disclosure or inspection of internal investigation documents if a legal statute so provides, if such action is necessary because of overriding third-party interests (article 9 paragraph 1, Swiss Federal Act on Data Protection) or if the request for information is manifestly unfounded or malicious. Furthermore, a restriction is possible if overriding the self-interests of the responsible company requires such a measure and it also does not disclose the personal data to third parties. The employer or responsible party must justify its decision (article 9 paragraph 5, Swiss Federal Act on Data Protection).[1]

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

[1] Claudia M. Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 284 et seq.

Last updated on 15/09/2022

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

### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
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This is dependent on the employee's employment contract and the employer's internal grievance policies and investigative processes. There is no free-standing legal entitlement for an employee to have legal representation. Employers may, at their discretion, consider allowing an employee to bring a colleague or to have legal representation if such a request is reasonable, such as to provide emotional support to the employee who may view the disciplinary hearing as an unnerving and stressful experience or so that the employee may be advised and informed of his or her legal rights in respect of the investigation commenced against him or her.

Last updated on 15/09/2022

### Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

The employee has no right to bring legal representation. However, the outcome of an investigation may lead to employment-related consequences, so it may be appropriate (depending on the situation) to offer the employee the opportunity to bring a union representative (if the employee is unionised) or a legal representative.

Last updated on 15/09/2022

### Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

In the case of an employee involved in an internal investigation, a distinction must be made as to whether the employee is acting purely as an informant or whether there are conflicting interests between the company and the employee involved. If the employee is acting purely as an informant, the employee has, in principle, no right to be accompanied by their own legal representative.[1]

However, if there are conflicting interests between the company and the employee involved, when the employee is accused of any misconduct, the employee must be able to be accompanied by their own legal

representative. For example, if the employee's conduct might potentially constitute a criminal offence, the involvement of a legal representative must be permitted.[2] Failure to allow an accused person to be accompanied by a legal representative during an internal investigation, even though the facts in question are relevant to criminal law, raises the question of the admissibility of statements made in a subsequent criminal proceeding. The principles of the Swiss Criminal Procedure Code cannot be undermined by alternatively collecting evidence in civil proceedings and thus circumventing the stricter rules applicable in criminal proceedings.[3]

In general, it is advisable to allow the involvement of a legal representative to increase the willingness of the employee involved to cooperate.

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

[2] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 59.

[3] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 392; Niklaus Ruckstuhl, BSK-StPO, Art. 158 StPO N 36.

Last updated on 15/09/2022

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

### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
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An employee who is a member of a works council or trade union has the right to seek assistance from the works council or trade union representative (whichever is applicable) and have the works council or trade union involved in resolving the grievances.

For unionised companies, the grievance procedure and the role of the union representative are usually set out in the collective agreement entered into between the company and the works council or trade union. In some organisations, the employee handbook or grievance policy will also state when the trade union representative will be involved in the investigation process.

Last updated on 15/09/2022

### Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

No, but if the employee under investigation is unionised it is appropriate to inform the union about the investigation. If the employer chooses to take action against the employee during, or after, the investigation, the trade union generally needs to be consulted before any final decisions are made.

If the Swedish Whistleblowing Act applies, the employer is not authorised to inform a works council or trade

union about the investigation, as it may be in violation of the duty of confidentiality (see question 10).

Last updated on 15/09/2022

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*
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In general, works councils and trade unions are not very common in Switzerland and there are no statutory rules that would provide a works council or trade union a right to be informed or involved in an ongoing internal investigation. However, respective obligations might be foreseen in an applicable collective bargaining agreement, internal regulations or similar.

Last updated on 15/09/2022

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

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

Employers may provide support, such as:

1. offering counselling for its employees to encourage open discussions and communication on any issues that they may be facing or clarify any questions they may have in respect of the investigation process;
2. reminding its employees of its zero-retaliation policy; and, if need be
3. making the necessary work arrangement to minimise potential interaction that would further aggravate the conflict or situation between the employees involved.

Employers may also inform employees of the external resources available to them if they require any assistance in respect of the investigation provided by external parties such as TAFEP, the Singapore National Employers Federation, National Trade Union Congress, and Legal Aid Bureau.

Last updated on 15/09/2022

## Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

The employer is responsible for the work environment and must ensure that employees are not at risk of mental (or physical) illness due to an investigation. If an employee, in connection with an investigation, requires support or if risk of ill health is otherwise anticipated, the employer is obliged to assess the situation and provide said employee with sufficient support (eg, counselling or work adjustments).

Last updated on 15/09/2022

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The employer does not generally need to provide specific support for employees that are subject to an internal investigation. The employer may, however, allow concerned employees to be accompanied by a trusted third party such as family members or friends.[1] These third parties will need to sign separate non-disclosure agreements before being involved in the internal investigation.

In addition, a company may appoint a so-called lawyer of confidence who has been approved by the employer and is thus subject to professional secrecy. This lawyer will not be involved in the internal investigation but may look after the concerned employees and give them confidential advice as well as inform them about their rights and obligations arising from the employment relationship.[2]

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

[2] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern, 2021, p. 133.

Last updated on 15/09/2022

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

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

If unrelated matters that require further investigation are revealed as a result of the investigation, the employer should take the necessary steps to investigate these matters, where relevant, under the employer's grievance reporting, investigation and disciplinary processes. This should be done separately and independently from the existing investigation. Please note that section 424 of the Criminal Procedure Code imposes a legal duty on any person who is aware that another has committed certain specified offences to "immediately" report the matter to the police, "in the absence of reasonable excuse" not to do so. Failure to comply with this requirement is punishable with imprisonment for up to six months, and/or a fine.

Last updated on 15/09/2022

## Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

According to the GDPR, personal data can only be processed for specified, explicit and legitimate purposes and may not be further processed in a manner that is incompatible with those purposes. This imposes restrictions on the use of material from previous investigations in new investigations when the material was

collected for other purposes. It is, therefore, necessary to ensure whether the new matter relates to the investigation and falls within the purpose of the investigation. If the new matter is unrelated to the investigation and does not fall within the purpose of the investigation, the identified information may not be processed under the GDPR.

Except for what is stated above, no regulation limits how the employer can use information regarding unrelated matters. Unrelated matters may be a myriad of different things, and could in some instances just be discarded, while in other situations the information may invoke a responsibility to act for the employer (eg, if the unrelated matters concern work environment issues or other severe misconduct by an employee who is not the target of the investigation). Furthermore, the employer may always use any revealed information (unrelated or not) as evidence in a court of law, since the principle of free examination of evidence applies.

Last updated on 15/09/2022

### Switzerland

Author: *Laura Widmer, Sandra Schaffner*
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There are no regulations in this regard in the Swiss employment law framework. However, in criminal proceedings, the rules regarding accidental findings apply (eg, article 243, Swiss Criminal Procedure Code for searches and examinations or article 278, Swiss Criminal Procedure Code for surveillance of post and telecommunications). In principle, accidental findings are usable, with the caveat of general prohibitions on the use of evidence.

Last updated on 15/09/2022

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

### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

The employer should require the employee to raise the grievance under the company's existing grievance reporting, disciplinary and investigation processes so that the grievance, to the extent that it is relevant to the current investigation, can be investigated together. Otherwise, the grievance can be dealt with separately and independently of the existing investigation.

Last updated on 15/09/2022

### Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

There are no formal rules or processes for handling grievances in Sweden. Depending on the nature of the grievance, such a complaint may also have to be investigated (unless the grievance is deemed to be trivial). This could, for example, be the case if the grievance concerns new or other work environment

issues that the employer is obliged to investigate.

Last updated on 15/09/2022

### Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

In the context of private internal investigations, grievances initially raised by the employee do not usually have an impact on the investigation.

However, if the employer terminates the employment contract due to a justified legal complaint raised by an employee, a court might consider the termination to be abusive and award the employee compensation in an amount to be determined by the court but not exceeding six months' pay for the employee (article 336 paragraph 1 (lit. b) and article 337c paragraph 3, Swiss Code of Obligations). Furthermore, a termination by the employer may be challenged if it takes place without good cause following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee (article 10, Federal Act on Gender Equality).

Last updated on 15/09/2022

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

### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

If the employee under investigation has already responded to the allegations made against him or her and his or her participation is no longer required at this stage in the investigation, the employer may proceed with the investigation even while the employee is off sick.

However, if the employee under investigation has not responded to the allegations made against him or her and his or her participation is still required in the investigation, the company may exercise its discretion to pause the investigation until the employee can assist in the investigations.  To prevent an employee from using a medical condition as an excuse to delay or avoid the investigation, the company may require the employee to provide specific medical documentation to address the issue of the employee's ability to participate in the investigation and to adjust the investigation process accordingly. For instance, instead of scheduling an in-person interview, the company may send a list of written questions for the employee to answer, and may also extend timelines for responding, etc.

If the employee is unable to return to work for the foreseeable future, the employer may consider reaching a provisional outcome based on the available evidence, which would be subject to change when the employee under investigation can return to work.

Last updated on 15/09/2022

### Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

The employer is responsible for the employee's work environment during the investigation. The employer must assess the situation and the impact on the employee's health and may, depending on the situation, have to postpone certain investigative measures, such as interviewing the employee in question. The investigation may even have to be completed without the employee participating.

Last updated on 15/09/2022

### Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The time spent on the internal investigation by the employee should be counted as working time[1]. The general statutory and internal company principles on sick leave apply. Sick leave for which the respective employee is not responsible must generally be compensated (article 324a paragraph 1 and article 324b, Swiss Code of Obligations). During certain periods of sick leave (blocking period), the employer may not ordinarily terminate the employment contract; however, immediate termination for cause remains possible.

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

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[1] Ullin Streiff/Adrian von Kaenel/Roger Rudolph, Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR, 7. A. 2012, Art. 328b N 8 OR.

Last updated on 15/09/2022

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

### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

Generally, there are no issues with an internal investigation being conducted in parallel to a criminal or regulatory investigation. The employer should inform the authorities of the ongoing internal investigation and comply with lawful directions from the authorities, for example, to share evidence gathered during the investigation with the authorities.

Last updated on 15/09/2022

### Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
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Handling a parallel investigation will have to be assessed on a case-by-case basis depending on the applicable rules. For instance, an investigation under the Swedish Discrimination Act is subject to certain timing requirements with which the employer must comply. In other cases, it may be more appropriate to hold off the workplace investigation while awaiting the outcome of the parallel investigation.

The police or regulator can, depending on the matter at hand, request an employer to share evidence. The police or the regulator may also, under certain circumstances, retain evidence in a search.

Last updated on 15/09/2022

### Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

Last updated on 15/09/2022

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

### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

The employee under investigation should be told of the findings that have been made against the employee, the disciplinary action (if any) that will be taken against the employee and any avenue or timeline for the employee to appeal the outcome of the investigation.

Last updated on 15/09/2022

### Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

This depends on the outcome of the investigation and the applicable rules.

If the outcome of the investigation leads to termination, the employer will have to disclose some information regarding the reason for termination. If the employee questions the termination, the employer may have to disclose more information in a subsequent dispute. If the outcome of the investigation leads to less invasive measures, such as a warning, there are less extensive requirements to provide information.

If the Swedish Whistleblowing Act applies, the duty of confidentiality and the restrictions on access to and

disclosure of personal data must be considered (see question 10). If the investigation is based on the rules in the Swedish Discrimination Act, there are also feedback requirements concerning the involved parties.

Last updated on 15/09/2022

### Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.[1] In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.[2]

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[1] Arbeitsgericht Zürich, Entscheide 2013 No. 16; Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 393 et seq.

[2] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 394.

Last updated on 15/09/2022

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

### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

It would suffice for a summary of the investigation’s findings to be shared with the complainant and the respondent employees.

Last updated on 15/09/2022

### Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
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There is no obligation to share the investigation report, neither in full nor key findings, with the involved parties. An assessment needs to be made in each case of what is appropriate to share and with whom.

When sharing an investigation report, certain data protection considerations must be made. A purpose and legal basis for the sharing must be established and, in principle, documented.

If the Swedish Whistleblowing Act applies, the duty of confidentiality and the restrictions on access to and disclosure of personal data must be considered (see question 10).

Last updated on 15/09/2022

### Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).[1] Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.[2]

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[1] Nicolas Facincani/Reto Sutter, Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten, in: HR Today, to be found on: <Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

Last updated on 15/09/2022

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

### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

The employer should take any follow-up steps required and keep track of whether any appeal against the outcome of the investigation is lodged. If any appeal is lodged, the employer should handle this appeal following its internal procedure. To the extent necessary, any disciplinary measures against the respondent employee should be stayed pending the outcome of the appeal.

Last updated on 15/09/2022

### Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

An investigation may result in employment law measures (eg, support, training, relocation, warning, termination or dismissal). An investigation may also be inconclusive and not result in any action.

Last updated on 15/09/2022

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

If the investigation uncovers misconduct, the question arises as to what steps should be taken. Of course, the severity of the misconduct and the damage caused play a significant role. Furthermore, it must be noted that the cooperation of the employee concerned may be of decisive importance for the outcome of the investigation. The possibilities are numerous, ranging, for example, from preventive measures to criminal complaints.[1]

If individual disciplinary actions are necessary, these may range from warnings to ordinary or immediate termination of employment.

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[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 180 et seq.

Last updated on 15/09/2022

# 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?

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*
at Rajah & Tann Singapore

A summary of the investigation's findings should be disclosed to the employee who lodged the grievance and the employee under investigation.

If there are parallel criminal or regulatory investigations, the investigation findings should also be disclosed to the authorities.

Interview records or transcripts should be kept private unless disclosure is required by a court order or at the direction of the authorities.

Last updated on 15/09/2022

## Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*

at Mannheimer Swartling

Findings may have to be handed over to the police or the regulator – there is no separate legal protection for material in employer investigations related to authorities. If the investigation has been carried out by a law firm, see question 14 on attorney-client privilege.

Last updated on 15/09/2022

## Switzerland

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The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.[2]

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[1] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), Interne und regulatorische Untersuchungen, Zürich/Basel/Genf 2016, p. 123.

[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), Interne und regulatorische Untersuchungen, Zürich/Basel/Genf 2016, p. 102 et seq.

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

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This depends on the company’s internal disciplinary policy and the severity of the offence. For instance, a written warning issued against an employee for minor misconduct is usually kept in the respondent employee’s file for one year and if the employee does not commit any further breaches during this time, the written warning will be expunged. However, if there is a finding of serious misconduct, particularly if such a determination results in the dismissal of the employee, these records are generally kept in the employee’s file for the duration of time such records are statutorily required to be maintained.

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## Sweden

## Sweden

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Under the GDPR personal data may not, according to the general principle on storage limitation, be retained for longer than is necessary for the purposes for which the personal data are processed. The GDPR does not stipulate a generally applicable storage limitation period. Such a regulation is, on the other hand, included in the Swedish Whistleblowing Act. If the Swedish Whistleblowing Act applies, the outcome of the investigation and all personal data should be retained for as long as necessary, but not for longer than two years after the investigation has been closed.

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## Switzerland

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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]

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

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

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The employer may be exposed to legal action for a failure to properly conduct the investigation, including having such portions of the investigation set aside or held to be void by the courts, and be made to pay damages to the affected employee; or face investigation and administrative penalties by regulatory authorities such as the MOM.

In addition, after the Workplace Fairness Legislation comes into force, breach of its requirements may also expose the employer or culpable persons to potential statutory penalties. The Tripartite Committee on

Workplace Fairness recommended, among other things, for the Workplace Fairness Legislation to provide for a range of penalties including corrective orders, work pass curtailment and financial penalties against employers or culpable persons, depending on the severity of the breach. It is thus expected that employers or culpable persons may be exposed to potential statutory penalties if the requirements of the Workplace Fairness Legislation are not complied with.

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## Sweden

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Errors resulting in terminations can be unlawful and, if they lead to employees terminating their employment as a result of the employer's missteps, could be seen as constructive dismissal. Constructive dismissal is generally equivalent to an unlawful dismissal. Unlawful terminations generally result in an obligation to pay financial and general damages to the affected employees.

Failure to fulfil the obligations under the Swedish Discrimination Act may lead to an obligation to pay financial and general damages.

If an employer does not fulfil its obligations according to work environment legislation, there is a risk that the Swedish Work Environment Authority will issue injunctions or prohibitions against the employer. If an employer omits to meet its work environment related obligations, and that in turn results in a work related accident, e.g. self-harm in connection with an internal investigation, it may also, in a worst case scenario, lead to criminal liability.

The Swedish Work Environment Authority is also responsible for monitoring compliance with the provisions of the Swedish Whistleblowing Act. The Swedish Work Environment Authority may, if necessary to ensure compliance with the Swedish Whistleblowing Act, order an operator to comply with the obligations and requirements of the Swedish Whistleblowing Act. Employers violating the Swedish Whistleblowing Act may also be liable to pay damages to the affected employees.

If personal data is processed in a way that violates the GDPR, the authorised supervisory authority may issue warnings or reprimands to the data controller, order the controller to comply with the GDPR, impose a ban on processing, or impose an administrative fine on the controller. Companies violating the GDPR may also be liable to pay damages to data subjects.

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## Switzerland

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As there are no specific regulations for internal investigations, the usual legal framework within which the employer must act towards the employee derives from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights.

But, for example, unwarranted surveillance could conceivably result in criminal liability (article 179 et seq, Swiss Criminal Code) for violations of the employee's privacy. Furthermore, errors made by the employer could have an impact on any later criminal proceedings (eg, in the form of prohibitions on the use of evidence).[1]

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual's interest in not using the evidence and in establishing the truth.[2] The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.[3] Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to criminal proceedings, to examine whether the evidence could also have been obtained by legal means.[4]

Unlawful action by the employer may also have consequences on future criminal proceedings: The prohibitions on exploitation (article 140 et seq, Swiss Criminal Procedure Code) apply a priori only to evidence obtained directly from public authorities. Evidence obtained unlawfully by private persons (ie, the employer) may also be used if it could have been lawfully obtained by the authority and if the interest in establishing the truth outweighs the interest of the individual in not using the evidence.[5] Art. 140 paragraph 1 Swiss Criminal Procure Code remains reserved: Evidence obtained in violation of Art. 140 paragraph 1 Swiss Criminal Procure Code is subject to an absolute ban on the use of evidence (e.g. evidence obtained under the use of torture[6]).[7]

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[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[4] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

[6] Jérôme Benedict/Jean Treccani, CR-CPP Art. 140 N. 5 and Art. 141 N. 3.

[7] Yvan Jeanneret/André Kuhn, Précis de procédure pénale, 2nd Edition, Berne 2018, N 9011.

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